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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1377

NATHAN WECHSLER, GEORGE FAIGEN, SEYMOUR FAIGEN, SIGMUND GOLDBLATT, ROBERT C. COTTEN, JR., and A. CLAIBORNE LEIGH, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgments of that court entered February 5, 1968, affirming petitioners' convictions under a two-count indictment charging them with con-

spiracy and substantive violations of 18 U.S.C. § 1952 (a)(3) (CA[1] 2-3, 6-7). Petitioners Wechsler, George Faigen, Goldblatt, Cotten and Leigh were sentenced to two years imprisonment and petitioner Seymour Faigen was sentenced to eighteen months imprisonment (CA 418-419).

OPINIONS BELOW

The opinions of the Court of Appeals (the majority opinion of Judge Craven and the dissenting opinion of Judge Winter) have not yet been officially reported, but are set out in Appendix "A," *infra,* pp. 1a-17a. The District Court did not write or deliver an opinion.

JURISDICTION

The judgments of the court below were entered on February 5, 1968. A timely petition for rehearing *en banc* was denied on March 7, 1968. On March 25, 1968, the Chief Justice granted an extension of time to file this petition to April 30, 1968. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is the term "unlawful activity" as used in 18 U.S.C. § 1952(a)(3) circumscribed by the state laws identified in § 1952(b)(2), thereby requiring proof of a use of interstate facilities with intent to violate those state laws?

2. (a) Do the Fifth and Sixth Amendments permit defendants to be convicted on the theory that they

[1] The letters "CA" refer to the consolidated appendix printed for use of the court below.

used and conspired to use interstate facilities to carry on an "illegal zoning," where the indictment charged (a) the use of interstate facilities "with the intent to promote, * * * an unlawful activity, to wit, bribery, in violation of the laws of" a state and (b) a conspiracy to use such facilities to establish and carry on "an unlawful activity by the bribery of officers of * * * [a state] in violation of the laws of * * *" that state?

(b) Do the Fifth and Sixth Amendments permit such conviction where until the Government closed its case the trial court ruled that the "unlawful activity" charged in the indictment was "bribery" in violation of state law, but then reversed itself, construed the "unlawful activity" to be an "illegal zoning," and sent the case to the jury on that basis?

3. Were petitioners denied a fair trial where the trial court (a) denied petitioners' motion for a separate trial from that of defendant Leigh, thereby depriving them of the opportunity of calling Leigh as a witness for the defense, (b) repeatedly refused to limit post-conspiracy declarations to the particular declarant, and (c) erroneously denied petitioners an opportunity to develop their defense on the merits?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are Art. I, § 9, cl. 3 (the *ex post facto* clause) and the Fifth and Sixth Amendments to the Constitution of the United States. The statutes involved are 18 U.S.C. § 1952 and §§ 18.1-278 and 279 of the Virginia Code. Pertinent portions of the constitutional provisions and statutes are set forth in Appendix "B," *infra*.

STATEMENT OF THE CASE

Petitioners Wechsler, Goldblatt, George Faigen and Seymour Faigen, hereinafter sometimes called the "developer defendants," were indicted along with petitioners Robert C. Cotten, Jr. and A. Claiborne Leigh and three others.[2] The two-count indictment charged each petitioner with (1) conspiring under 18 U.S.C. § 371 to violate 18 U.S.C. § 1952(a)(3) (CA 2-3) and (2) violating the substantive provisions of the latter statute (CA 6-7) in connection with a zoning in Fairfax County, Virginia.[3]

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[2] These were William C. Burrage, Stuart T. DeBell and Lytton Gibson who were acquitted by the court at the close of the Government's case.

[3] Count I charged that:

> "from on or about January 1, 1961 and continuing until July 20, 1962 * * * defendants * * * did unlawfully, willfully and feloniously conspire * * * to violate Section 1952 of Title 18, United States Code; that is to say to use and cause to be used facilities in interstate commerce, and to travel in interstate commerce, to establish and carry on and facilitate the establishment and carrying on of an unlawful activity by the bribery of officers of the State of Virginia in violation of the laws of the State of Virginia: to-wit, Title 18.1-278 and 18.1-279 of the Code of Virginia" (CA 2-3).

Count II charged that:

> "from on or about September 13, 1961 and continuing to on or about July 26, 1962 * * * defendants * * * did use facilities in interstate commerce and did willfully cause others to use facilities in interstate commerce with the intent to promote, establish, manage and carry on and facilitate the promotion, establishment, management and carrying on of an unlawful activity, to-wit, bribery, in violation of the laws of the Commonwealth of Virginia, to-wit, §§ 18.1-278 and 18.1-279 of the Code of Virginia, and did thereafter perform acts to facilitate the promotion, establishment, management and carrying on of the said unlawful activity" (CA 6-7).

A. Pre-Trial Motions

1. Motions to Dismiss

Petitioners moved to dismiss the indictment (CA 20, 22, 32) on the ground that (1) inasmuch as 18 U.S.C. § 1952(b) (2) defines the proscribed "unlawful activity" as "bribery" in violation of state law and (2) the crime of bribery is complete upon the giving, offering or promising of the bribe, notwithstanding that the official act to be done in consideration therefor is to occur in the future,[4] a conspiracy to use interstate facilities to establish and carry on that bribe could not, as a matter of law, extend beyond the distribution of the bribe money. Accordingly, since distribution of the bribe money had been completed prior to September 13, 1961—the date § 1952 was enacted—no petitioner could have used an interstate facility thereafter with the requisite statutory intent and application of 18 U.S.C. § 1952(a)(3) was *ex post facto* as to them.

The trial court agreed with petitioners that the indictment charged the use of interstate facilities to establish and carry on the crime of bribery under the laws of Virginia (CA 80-84), but denied their motions to dismiss on the prosecutor's representation that the Government would prove that Leigh's personal check to Cotten dated September 9, 1961—the last of the alleged payoffs—was actually delivered on or after September 13, 1961 (CA 84), the date § 1952 was enacted. The trial judge assured petitioners that if the

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[4] This is the law in Virginia (Pet. App. 10a-11a), in the federal courts, *e.g.*, *Howard* v. *United States*, 345 F. 2d 126, 128 (1 Cir. 1965), and everywhere else. *E.g.*, *Curtiss* v. *State*, 113 Ohio St. 187, 148 N.E. 834, 835 (1925).

prosecutor did not prove delivery on or after September 13, 1961

> "* * * I will grant the motion for a judgment of acquittal at the end of his case, and you will have a finality, and you won't have to worry about this case any more" (CA 86).

Neither the Government's promise that it would prove that the check was delivered on or after September 13, 1961, nor the trial court's ruling that dismissal would follow if the Government failed to do so, were carried out. For, when the Government failed to prove the crime on the basis of the original construction of the indictment,[5] the trial court denied the motions for acquittal, switched the "unlawful activity" charged from "bribery" to an "illegal zoning" accomplished by means of bribery and subsequently allowed the case to go to the jury and petitioners to be convicted on its "illegal zoning" theory. The court of appeals agreed that the indictment as thus construed stated an offense under § 1952(a)(3), causing the dissenting judge to state:

> "[T]he majority has denied due process of law, because it has created by judicial fiat a federal crime not brought into existence by § 1952 itself, 'the use of interstate facilities with intent to promote an illegal zoning' " (Pet. App. 13a).

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[5] At the hearing of petitioners' motion for a bill of particulars to require the Government to specify the object of the conspiracy (CA 62), the trial court said it had already construed the indictment to charge a conspiracy to use interstate facilities to commit the unlawful activity defined as "bribery, or attempting to bribe" (CA 89-90), whereupon petitioners withdrew their motion in reliance upon the trial court's express determination "as to what the indictment states" (CA 90-91).

2. Motion for Severance

After the trial court entered its order denying all defense motions attacking the sufficiency of the indictment (CA 65-67), petitioner Goldblatt sought a limited severance from petitioner Leigh[6] to enable him to call Leigh as a defense witness (CA 91, 92).[7] The trial court denied this motion (CA 95), without prejudice to its renewal, on condition that counsel secure and file a statement from Leigh signifying "he is going to make an exculpatory statement helping everybody in this case and * * * taking the onus himself * * *" (CA 96, 98).

B. The Trial

When the jury was being impaneled on January 9, 1967, the trial court told the panel that "[t]he unlawful activity that [defendants] are alleged to have conspired to use interstate facilities to promote or carry on, is an alleged bribery of certain officials of Fairfax County in re zoning activities in violation of the statute law of Virginia" (CA 119). This was repeated at least three more times before the jury was sworn, each time the trial court stating that the alleged "unlawful

[6] This motion was joined by counsel for all other defendants (CA 95, 98-99).

[7] Counsel stated: "[Mr. Leigh has] already submitted an affidavit in this case as to when and where a key check was delivered. * * * [W]e want to get that evidence in our case in chief, and we cannot get that evidence in our case in chief * * * unless we can call him, and we cannot call him if his counsel says he is not going to take the stand in this case but will only do so as a witness if he is given a separate trial. Now, also we want to call him as to the purpose of that check, whether it was for the purpose of a payment of a legal fee to Mr. Cotten or [something] else, and that, too, goes to the heart of our case * * *" (CA 96).

activity" was *bribery* in connection with a zoning in Fairfax County (CA 120, 121).[8]

1. The Government's Case

On March 9, 1960, petitioner George Faigen, a partner in "Trailer Court Ventures," filed an application for a zoning change. On April 25, 1961, before the zoning came before the Fairfax County Board of Supervisors, four of the five partners[9] wrote a letter to the Security Bank of Washington placing $5,500 in escrow for John C. Somers Esq. for "professional services rendered" contingent upon favorable zoning action by the Board (CA 425).

The application was granted on July 26, 1961, on the affirmative votes of Supervisors Leigh, DeBell, Cotten and Wilkins (CA 196), after which the Security Bank was instructed to release Somers' $5,500 check (CA 427). Somers deposited the check to his own account on August 18, 1961 (CA 433).[10] On August 19, petitioner Leigh deposited Somers' check for $5,500 to his

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[8] Earlier, counsel for the Faigens filed a written request with the court (CA 68) asking that the trial judge inquire on the *voir dire* whether any juror might be prejudiced against any defendant who belonged to the Jewish faith. This request, clearly applicable to all developer defendants, each of whom is Jewish, was specifically denied as to them (CA 119, 122), with the later understanding that it was denied as to all other defendants as well (CA 124-125, 413-416, 418). This issue is raised in the petition for certiorari in *Parzow* v. *United States*, No. , this Term. If certiorari is granted in that case, we will move to amend our petition to include that issue as one of the "Questions Presented" here.

[9] The fifth partner was Lawrence Dobrow, who testified for the defense (CA 290).

[10] Somers testified that, before he obtained this check, Leigh told him there was a check made out to him for $5,500, that he should run it through his own account, and that he should then make out a check payable to Leigh for the same amount, which he did (CA 164).

own account (CA 434), whereupon he wrote a check to DeBell for $1,308.33 on August 22 (CA 435) and a check to himself for $1,333.00 on August 23 (CA 436). On September 9, Leigh wrote a check to petitioner Cotten in the amount of $1,000 (CA 437).[11]

18 U.S.C. § 1952 became law on September 13, 1961.

On September 15, Cotten's legal secretary deposited the $1,000 check to Cotten's account, recording it in the checkbook as a legal fee from Leigh, who was then Cotten's client (CA 222-223, 482, 484).[12] On April 27, 1962, the Fairfax County Circuit Court entered a final decree setting aside the first zoning (G. Ex. 54, CA 496) and on June 20, 1962, George Faigen filed a new zoning application (CA 141). The second zoning application came before the Board on July 25, 1962,[13] at which time it was granted on the affirmative votes of Supervisors Leigh, DeBell, Cotten, Wilkins and Brault (CA 464). Two supervisors dissented.[14]

An IRS Special Agent testified that petitioner George Faigen told him in July, 1965 (CA 248) that

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[11] Both Cotten and Leigh submitted affidavits in connection with the motion to dismiss the indictment stating that the check was personally delivered to Cotten on September 9 (CA 43, 44).

[12] Sometime later (CA 227-228, 230) she copied the checkbook entry into Cotten's cash receipt book (CA 485).

[13] The trial court admitted into evidence over objection (CA 274-275) two letters from Goldblatt to zoning attorney Gibson, dated June 17 and July 18, 1962, respectively (G. Ex. 24, CA 467 and G. Ex. 26, CA 472), and a letter from George Faigen to Gibson dated July 21, 1962 (G. Ex. 25, CA 469), all three of which related to the second zoning.

[14] The trial court admitted over objection (CA 137) evidence that on July 25, 1962, Supervisor Moss challenged Cotten's right to vote on the ground that Cotten and George Faigen had become associated in business (G. Ex. 19, CA 460, 462-463) and Cotten's reply that "he had never even heard of Mr. Faigen at the time he voted on [the first] application" (CA 463).

he did not know a "John Somers" (CA 250), that petitioner Goldblatt told him in September, 1965 (CA 246) that "he didn't think [Somers] had anything to do with [the zoning]" (CA 247-248), and that petitioner Wechsler told him on December 10, 1965 (CA 269) that (1) Trailer Court Ventures had entered into an agreement with Somers to do a *study* on trailer parks which originally called for a payment of $15,000 but which was later settled for $5,500 (CA 244-245), and (2) perhaps Somers had a separate deal with Leigh on the original $15,000 (CA 245). Petitioners' attempts to limit these post-conspiracy declarations to the particular declarant were uniformly rebuffed. See *infra,* pp. 27-29.

2. Motions for Acquittal

Although the Government failed to prove that Leigh's $1,000 check to Cotten was delivered subsequent to September 13, 1961 (CA 282-283), the trial court, contrary to its earlier ruling (CA 86), denied defense motions for acquittal (CA 283-285, 287). stating that the object of the conspiracy charged, *i.e.,* the "unlawful activity" proscribed by 18 U.S.C. § 1952(b)(2), "was not a bribery" (CA 283) but the "[obtaining of] a zoning by illegal means" (CA 287). A defense motion to strike overt acts 2 through 7 of the indictment (CA 5-6) was denied on the same basis (CA 285-286).[15]

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[15] The trial court's theory, announced for the first time at the close of the Government's case, was that, unless a defendant performed some specific act after September 13, 1961 in furtherance of an *illegal zoning,* Count II of the indictment (CA 6-7) (the substantive count) would have to be dismissed (CA 287-289, 343-347). Accordingly, the trial court granted motions to dismiss Count II as against petitioners Wechsler and Seymour Faigen (CA 288), but denied them as against the other petitioners (CA 288-289).

3. Petitioners' Case

Developer defendants asserted they had hired Somers, a lawyer, to represent them on their zoning application together with Lytton Gibson, their original zoning attorney. A fee of $500 for a brochure plus $15,000 was discussed (CA 292-295). When Gibson refused to work with Somers, developer defendants sought to annul Somers' arrangement (CA 293-294), but he insisted he had done work and was entitled to be paid (CA 295). Petitioners then made an inquiry and were advised that Somers had influence with the Board of Supervisors and could be harmful to them (CA 309). A settlement was thereafter reached pursuant to which a $5,500 fee would be escrowed subject to a grant of the zoning (CA 296). The Board of Supervisors approved the zoning application on July 26, 1961, the escrowed fee was released to Somers on August 18, 1961, and petitioners neither had an understanding with Somers that he would pass the money on nor did they know that he had done so.

In support of this defense, counsel attempted to show that petitioner Wechsler, who had been delegated the task of dispensing with Somers' services (CA 294), had a conference with William J. DeMik, a lawyer (CA 314), who strongly advised petitioners to settle Somers' claim. DeMik testified he had had a conference with Wechsler around April 15, 1961 (CA 315), after which he made certain inquiries concerning Somers (CA 315). Sometime prior to May 8, 1961, he reported back to Wechsler that Somers was "extremely well connected * * * with the [Fairfax] County Board" (CA 316). The trial court, however, refused, *sua sponte,* to permit DeMik to answer the very next question: "Did you give Mr. Wechsler some advice?" (CA 316), whereupon

counsel was denied the opportunity to prove that the witness would have answered that he advised Wechsler to settle Somers' claim (CA 317-318).

4. Motions, Requests for Instructions, and Charge

At the close of the entire case, the trial judge explicitly adopted the theory that the conspiracy did not terminate until July 25, 1962 (CA 343-348, 359-360), stating that, while he had always been of that view, he had not expressed his words very clearly before (CA 344). Motions for acquittal were therefore denied.

Developer defendants' requested instruction No. 8 (CA 70), as orally amended (CA 358), read as follows:

> "If you find that a defendant did not, after September 13, 1961, have any intent to establish, carry on or facilitate the establishment or carrying on of an unlawful activity under the laws of the Commonwealth of Virginia, to wit: bribery, I instruct you to find that defendant not guilty with respect to Count I of the indictment."

The trial court refused this instruction on the ground that "bribery was a conduit to accomplish an * * * unlawful act, and so I am not going to use the date of the 13th" (CA 358, 360). Requested instructions Nos. 9 and 10 (CA 71), which applied to Count II of the indictment, were refused on the same ground (CA 358, 359-360), the trial court having previously ruled that the "unlawful activity" charged in Counts I and II were "identically the same in both counts" (CA 346-347). The trial court told counsel it was going to charge the jury that "the unlawful activity prohibited here was * * * a scheme to obtain an illegal zoning * * * and the means that they were using to

obtain the zoning * * * was bribing public officials" (CA 360). The case was sent to the jury on that basis (CA 369, 373) and, on January 14, 1967, the jury returned verdicts of "guilty" against all defendants (CA 390-391).

C. Post-Verdict Proceedings

Petitioners' timely motions for a new trial or in arrest of judgment (CA 392-406) were denied by the trial court (CA 418), after which they were sentenced to imprisonment (CA 418-419)[16] and notices of appeal were filed (CA 407-409).

On February 5, 1968, the court below affirmed petitioners' convictions (Pet. App. 1a-7a), Judge Winter dissenting (Pet. App. 8a-17a).

REASONS FOR GRANTING THE WRIT

Although 688 persons were indicted between 1961 and 1966 under the federal anti-racketeering statutes enacted by Congress in 1961 (18 U.S.C. §§ 1952, 1953 and 1084) and convictions thereunder have increased each year,[17] this Court has never before interpreted § 1952 or § 1084.[18] Is the term "unlawful activity" as used in § 1952(a)(3), the most important of these statutes, circumscribed by the state laws identified in § 1952(b)? Does § 1952(a)(3) require proof of a use of interstate facilities with an intent to violate state

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[16] Although petitioners George Faigen, Goldblatt, Leigh and Cotten were convicted on both the conspiracy and substantive counts (CA 390), the sentences imposed on each count were to run concurrently (CA 418-419).

[17] Attorney General's Ann. Rep. 238 (1966).

[18] 18 U.S.C. § 1953 was interpreted by this Court in *United States v. Fabrizio*, 385 U.S. 263.

law? Up to the time of the decision below, the answer to both questions was clearly "yes"— a view shared by six courts of appeals,[19] the Solicitor General of the United States,[20] Attorney General Robert F. Kennedy,[21] and Assistant Attorney General Herbert J. Miller, § 1952's chief proponent in the Congress.[22] The court below answered both these questions "no" (Pet. App. 2a, 4a n. 3).

If the court below had held that the term "unlawful activity" meant "bribery * * * in violation of the laws of the State in which committed"—which, after all, is how Congress expressly defined it—the statute would have been *ex post facto* as applied and all petitioners would have been acquitted for the reasons enunciated by Judge Winter (Pet. App. 13a, 15a-17a). Judge

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[19] *Marshall* v. *United States*, 355 F.2d 999, 1003-1004 (9 Cir. 1966), *cert. denied*, 385 U.S. 815; *Spinelli* v. *United States*, 382 F.2d 871, 893-894 (8 Cir. 1967), *cert. granted*, No. 801, this Term; *United States* v. *Miller*, 379 F.2d 483, 486-488 (7 Cir. 1967), *cert. denied*, 389 U.S. 930; *United States* v. *Blackburn*, 389 F.2d 93, 96 (6 Cir. 1968); *Gilstrap* v. *United States*, 389 F.2d 6, 8 (5 Cir. 1968); *United States* v. *Chase*, 372 F.2d 453, 460 (4 Cir. 1967), *cert denied*, 387 U.S. 907.

[20] *E.g.*, *United States* v. *Nardello*, No. 1277, this Term, Juris. Statement, 6-7. *Zambito* v. *United States*, No. 986, Oct. T. 1962, Brief in Opp. 8-9; *Marshall* v. *United States*, No. 119, Oct. T. 1966, Brief in Opp. 8.

[21] *Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6572*, 87th Cong., 1st Sess., 34-35 (1961).

[22] *House Hearings*, *supra*, at 336-337, 339-340, 342-344; *Hearings before the Senate Judiciary Committee on S. 1653*, 87th Cong., 1st Sess., 106-110, 251-260 (1961); Miller, *The Travel Act: A New Statutory Approach to Organized Crime*, 1 Duquesne Univ. L. Rev. 181, 185, 195-196 (1963).

Winter said, "[t]he error of the majority is one of statutory interpretation, but as such it reaches constitutional magnitude" (Pet. App. 13a). It certainly does. In avoiding the mandate of the *ex post facto* clause, the court below (1) distorted § 1952(a)(3)'s plain language, (2) deprived the term "unlawful activity" of any ascertainable meaning and (3) created by judicial fiat a crime not brought into existence by § 1952 itself. The result is to inject uncertainty into all future prosecutions under § 1952 and to cast serious doubts as to that statute's continuing validity.

I

The Court of Appeals' Construction of § 1952 Conflicts With Decisions of Other Circuits and Jeopardizes the Constitutionality of the Act

The Court of Appeals identified the central question presented to be

> "whether the offense of using a facility in interstate commerce to promote, manage, establish, or carry on bribery and thereafter performing an act to promote, manage, establish, or carry on bribery is to be equated with, and limited by, the state law of bribery" (Pet. App. 1a-2a).

Until this case was decided the courts of appeals had uniformly decided this question in the affirmative; that is, they had held that the term "unlawful activity" as used in 1952(a)(3) was circumscribed by the state statutes identified in § 1952(b) and that § 1952(a)(3) required proof of a use of interstate facilities with *intent* to violate state law. On that basis, petitioners were entitled to judgments of acquittal for the reasons set forth in Judge Winter's dissent below (Pet. App.

13a, 15a-17a), and alternatively, to a new trial for four additional reasons.[23] The majority below, however, held that petitioners placed "too heavy reliance on state law" (Pet. App. 3a) and that it was unnecessary to show that petitioners used an interstate facility with the intent to promote a bribe in violation of Virginia law (Pet. App. 4a n. 3; 11a-13a). The Solicitor General, on the other hand, only recently advised this Court that "[t]he objective of assisting state law enforcement efforts [in § 1952] is reflected in the withholding of federal penalties for conduct which is not an offense at all under state law." *United States* v. *Nardello*, No. 1277, this Term, Juris. Statement, 7. Yet penalties were imposed in this case for just such conduct, *i.e.*, an "illegal zoning." In reaching this result, the decision below conflicts with the governing decisions of the Fifth, Sixth, Seventh, Eighth and Ninth Circuits (as well as the consistent position of the Government in this Court in *Nardello* and earlier cases), and raises serious doubts as to § 1952's constitutional validity.

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[23] These are: (1) the trial court erroneously charged that the "unlawful activity" proscribed by the statute was "illegally obtaining a zoning" (CA 347, 359-360, 369, 373); (2) the trial court erroneously refused to give petitioners' requested instruction on intent (*supra* p. 12); (3) the trial court erroneously refused to strike overt acts 2 through 7 of the indictment (CA 285-287); and (4) the trial court erroneously admitted into evidence as against all defendants, declarations and statements made by other defendants in 1962, long after the alleged bribe conspiracy was over (*supra* p. 9, ftns. 13, 14). The court below pointed out that although petitioners' most serious argument was that their alleged "crime was complete before the statute was enacted" (Pet. App. 3a), many of petitioners' other arguments "are dependent upon the answer to [that] problem * * * and, hence, fall within the statutory construction that we have adopted" (Pet. App. 6a).

The Fifth, Sixth, Eighth and Ninth Circuits have held that the term "unlawful activity" as used in § 1952(a)(3) is circumscribed by the state statutes identified in § 1952(b). Thus, in *Marshall* v. *United States,* 355 F.2d 999, 1003-1004 (9 Cir. 1966), *cert. denied,* 385 U.S. 815, the court said: "The statute refers to the crime of extortion, 'as defined by the laws of the state in which committed,' or of the United States. * * * Count III, applying to acts in Nevada alone, would necessarily require a violation of the Nevada statutes." See also, *Raymond* v. *United States,* 376 F.2d 581, 582 (9 Cir. 1967); *Spinelli* v. *United States,* 382 F.2d 871, 893-894 (8 Cir. 1967), *cert. granted,* No. 801, this Term, March 4, 1968; *United States* v. *Ross,* 374 F.2d 227, 230 (6 Cir. 1967), judgment vacated on other grounds, No. 77, this Term, March 4, 1968; *Gilstrap* v. *United States,* 389 F.2d 6, 8 (5 Cir. 1968).

In addition, the Sixth, Seventh and Ninth Circuits have held that the *intent* required to make out a violation of § 1952(a)(3) is that required to violate the state statute identified in § 1952(b). Thus, in *United States* v. *Miller,* 379 F.2d 483, 486-488 (7 Cir. 1967), *cert. denied,* 389 U.S. 930, the court said: "Furthermore, Section 1952 here requires intent to violate State law * * *." See also, *United States* v. *Izzi,* 385 F.2d 412, 413 (7 Cir. 1967); *United States* v. *Lookretis,* 385 F.2d 487, 489 (7 Cir. 1967), judgment vacated on other grounds, No. 913, this Term, March 11, 1968; *United States* v. *Blackburn,* 389 F.2d 93, 96 (6 Cir. 1968); *Turf Center, Inc.* v. *United States,* 325 F.2d 793, 797 and n. 5 (9 Cir. 1963). In fact, this was the rule in the Fourth Circuit before the present case was decided. *United States* v. *Chase,* 372 F.2d 453, 460

(Bryan, Bell and Winter, JJ.),[24] *cert. denied,* 387 U.S. 907.

Since petitioners could not have been convicted under the rules enunciated by the Fifth, Sixth, Seventh, Eighth and Ninth Circuits, the need to resolve this conflict in the construction of a new and important federal statute is alone sufficient ground for review.[25] But there is a further compelling ground for certiorari. For, as the dissenting judge pointed out, the court below "created by judicial fiat a federal crime not brought into existence by § 1952 itself," thereby rendering the statute unconstitutional as construed (Pet. App. 13a-14a).

§ 1952(b)(2) expressly defines "unlawful activity" as "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." Yet the court below held that the term was not circumscribed by state law because "[t]he manifest purpose of the statute is to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials" (Pet.

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[24] On the petition for rehearing *en banc,* Judge Winter dissented and Judge Bryan abstained. Judge Bell died before the present case was argued. While a conflict within a circuit is not grounds for certiorari, it plainly is no warrant for denial when the most recent decision is in conflict with those of other courts. See, *e.g., United States* v. *Catto,* 384 U.S. 102.

[25] The decision below affects also the construction of numerous other statutes which follow the same technique of incorporating state law in creating federal offenses. See *United States* v. *Sharpnack,* 355 U.S. 286, 294-296; heretofore, the courts have not regarded themselves free to substitute their views of congressional "policy" for the state laws which Congress adopted.

App. 3a). In *Viereck* v. *United States*, 318 U.S. 236, however, this Court said:

> "* * * men are not subjected to criminal punishment because their conduct * * * thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law." *Id.*, at 245.

The decision in *Viereck*—unlike that of the majority below—was true to the principle which Chief Justice Marshall stated for the Court in *United States* v. *Wiltberger*, 5 Wheat. 76, 96:

> "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character with those which are enumerated * * *."[26]

As this Court held in *Bouie* v. *City of Columbia*, 378 U.S. 347, 362-363, and as Judge Winter appreciated

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[26] No such "strong" case can be made for the interpretation adopted below. On the contrary, the legislative history of § 1952 shows that the words accurately reflect the "purpose of the statute" to build upon state law and its enforcement. See ftns. 21 and 22, *supra*; *United States* v. *Burke*, 278 F. Supp. 711, 712, n. 1 (E.D. Pa. 1968), appeal pending, *United States* v. *Nardello*, No. 1277, this Term.

(Pet. App. 13a-14a), the *Wiltberger* principle becomes a requirement of due process, where, as here, judicial enlargement of a penal statute is given retroactive effect, because its violation denies fair notice to the citizen that his conduct is a breach of the statute. Nor is the denial of fair notice limited to these petitioners: as construed by the court of appeals, § 1952 fails to give any person fair warning of what it prohibits. Standing alone, the phrase "unlawful activity" does not provide a constitutionally adequate standard of conduct. Compare *Manley* v. *Georgia*, 279 U.S. 1, 6; *Screws* v. *United States*, 325 U.S. 91, 94-98 (opinion of Justice Douglas), 149-157 (opinion of Justices Roberts, Frankfurter and Jackson). Congress gave it constitutionally requisite precision by defining it in § 1952(b)(2). And the claim that § 1952 is unconstitutionally vague has been rejected for precisely this reason. *Gilstrap* v. *United States*, 389 F.2d 6, 8 (5 Cir. 1968); *Turf Center, Inc.* v. *United States*, 325 F.2d 793, 795 (9 Cir., 1963); *United States* v. *Smith*, 209 F. Supp. 907, 918 (E.D. Ill., 1962). This has likewise been the Government's response in this Court to the contention that § 1952 is unconstitutionally vague:

> "There is no merit to this contention. Insofar as Section 1952 is pertinent here, it proscribes interstate travel in promotion of defined unlawful activity. The 'unlawful activity' is not simply a business enterprise involving gambling but a 'business enterprise involving gambling * * * offenses *in violation of the laws of the State in which they are committed* * * *.' There is nothing difficult of interpretation as to the conduct thus prohibited. * * * The particular gambling offense involved is either legal or illegal under the law of the State where the crime was committed. The whole purpose of the statute (and the legislative history of

> the Act makes this abundantly clear) was to assist the States in the enforcement of local laws." *Zambito* v. *United States*, No. 986, Oct. T. 1962, Br. in Opp. 8-9 (emphasis in original).[27]

It is one thing for a court of appeals to erroneously construe a criminal statute. But, as the dissent below makes clear (Pet. App. 13a-14a), it is something else again to distort that statute's plain meaning in an attempt to enlarge it retroactively. Where, in addition, the decision belows casts serious doubts as to the continuing validity of an important criminal statute, and is in direct conflict not only with the decisions of five other circuits but with the consistent position asserted by the Government in this Court and before the Congress, the need for certiorari is clear.

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[27] The position asserted by the Solicitor General in *Zambito*, *supra*, and most recently in *Nardello*, *supra*, has been the consistent position of the Government in this Court. See *Zizzo* v. *United States*, No. 834, Oct. T. 1964, where the Government observed that the gambling operations petitioners travelled from Illinois to Indiana to promote were "illegal under the laws of the second state" (Br. in Opp. 5); *Barrow* v. *United States*, No. 609, Oct. T. 1966, where the Government defined unlawful activity as used in 1952 (b)(1) to mean any business enterprise involving gambling "in violation of state law" (Br. in Opp. 6); *Marshall* v. *United States*, No. 119, Oct. T. 1966, where the Government pointed out that Count III of the indictment in that case, which "was limited to acts in one state, Nevada * * * necessarily required proof of a violation of the Nevada extortion statutes" (Br. in Opp. 8); and *Miller* v. *United States*, No. 519, Oct. T. 1967, where the Government argued that the specific intent necessary to constitute a violation of the act was

> "an intent to promote an 'unlawful activity' which is defined to include a business enterprise involving gambling *in violation of the laws of the state in which it is conducted* * * *" (Br. in Opp. 4, emphasis supplied).

II

A. The Courts Below Amended the Indictment

Even if 18 U.S.C. § 1952 authorized conviction on the theory that "unlawful activity" means something other than "bribery" under the law of Virginia, the convictions of these petitioners could not stand. For while the jury was instructed that "the unlawful activity that is alleged in this indictment that they carried on was obtaining a zoning in Fairfax County via bribery" (CA 369, 373), that is not what the indictment charged.

Count II of the indictment specifically charged that each petitioner used an interstate facility "with the intent * * * to establish * * * and carry on * * * an unlawful activity: to wit, bribery, in violation of the laws of the Commonwealth of Virginia, to wit, §§ 18.1-278 and 18.1-279 of the Code of Virginia, and did thereafter perform acts to facilitate the * * * establishment * * * and carrying on of the said unlawful activity" (CA 7). Count I, the conspiracy count, charged that petitioners conspired "to use * * * facilities in interstate commerce * * * to establish and carry on * * * an unlawful activity by the bribery of officers of the State of Virginia in violation of the laws of the State of Virginia" to wit, Title 18.1-278 and 18.-279 of the Code of Virginia" (CA 2-3). The trial court held that the "unlawful activity" charged was "identically the same in both counts" (CA 347), a view shared by the majority (Pet. App. 1a) and Judge Winter (Pet. App. 8a-9a) below.

Accordingly, when the trial court switched the "unlawful activity" charged in the indictment from *bribery* to an *illegal zoning*" (CA 283, 287, 343-348), and

sent the case to the jury on the theory that the "unlawful activity" was an *illegal zoning* accomplished by means of bribery (CA 359-360, 369, 373),[28] the trial court amended "the charging part of the indictment" contrary to *Ex Parte Bain*, 121 U.S. 1, 10.

The court below focused solely on the trial court's switch of theories at the close of the Government's case and held that, since the indictment charged a conspiracy to violate § 1952, petitioners were entitled to a continuance and nothing more (Pet. App. 5a, n. 5). Even assuming § 1952 was correctly construed below, this holding runs afoul of *Stirone* v. *United States*, 361 U.S. 212, 216, 218-219. The indictment (CA 2-3, 7) cannot fairly be read as charging a conspiracy engaging the use of interstate facilities to promote a zoning.[29] See *United States* v. *Clarke, et al.*, Crim. 4379 (E.D. Va. 1967), whre Chief Judge Hoffman construed an identically worded indictment (compare CA 504, 509-510) as follows:

> "[T]his is not a charge involving a conspiracy engaging the use of interstate facilities to promote a zoning—it is to promote a bribery" (CA 514-515).

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[28] While other references in the charge seem to suggest that the "unlawful activity" was only bribery (CA 368, 369 ¶ 2), there can be no doubt that the case went to the jury on the broader "illegal zoning" theory. The trial judge explicitly instructed the jury that conviction could be based on proof of "at least one of the overt acts charged in the indictment" (CA 376). That, of course, could only have been true if the "unlawful activity" was "illegal zoning"—not bribery. Overt acts 2 through 7 (CA 5-6) related solely to "illegal zoning." Timely objection was made (CA 388).

[29] It may be, as we urged prior to the trial court's explicit ruling on this point (CA 89-91), that Count I (CA 2-3) was ambiguous (CA 64). If so, that count was fatally defective under *Russell* v. *United States*, 369 U.S. 749, 766-770.

B. The Trial Court's Switch of Theories Denied Petitioners Their Fifth and Sixth Amendment Rights

Even if the indictment could be construed as authorizing conviction on an "unlawful zoning" theory, petitioners' Sixth Amendment right to notice of the charges against them, and their Fifth Amendment right to due process was violated by the trial court's switch in theories at the close of the Government's case.

In addressing itself to this issue the Court of Appeals said:

> "Since the indictment quite clearly charges a conspiracy to violate § 1952, such a switch, if indeed it occurred, would have entitled appellants to no more than a continuance on the grounds of surprise. No such motion was made" (Pet. App. 5a, n. 5).

It is difficult to understand the court's intimation that there may have been no switch, for it appears in stark clarity from the record (CA 89-91, 282-283, 287, 343-348). The real question, therefore, is whether petitioners were entitled to no more than a continuance when it became manifest (CA 282-283) that, in view of the prosecutor's failure to prove the crime on the basis of the trial court's original construction of the indictment (CA 86, 89-91), they could be convicted on a different theory. Such a result would be permissible only if petitioners were not entitled to notice of the charges against them before that time, that is, before their motion for acquittal was denied.

Plainly, however, the right to notice of charges in every prosecution commenced by an indictment attaches at the outset, rather than after the prosecution has rested. *E.g., United States* v. *Simmons,* 96 U.S.

360, 362; *Russell* v. *United States*, 369 U.S. 749, 763-766. Only the other day, in *In re Ruffalo*, U.S. , decided April 8, 1968, after denial of rehearing below, this Court held that the charge must be known before the proceedings commence;" and the argument that petitioner's constitutional rights were preserved by the granting of a continuance were rejected.[30] Moreover, this Court has recognized, at least by implication, that the trial judge's construction of an indictment or the prosecution's representations in response to a motion for a bill of particulars or in an opening statement is definitive and binding. *United States* v. *Fruehauf*, 365 U.S. 146, 157-158. Yet the court of appeals treated the trial judge's repeated pre-trial rulings (CA 80-81, 85-86, 89-91, 119, 120, 121) as mere passing comments, on which petitioners could not safely rely in meeting the prosecution's case, and which entitled them to no more than a continuance in preparing their own.

Clearly, the decision of the court below countenanced an amendment of the charging part of the indictment in direct conflict with this Court's holdings in *Ex Parte Bain*, 121 U.S. 1, 10, and *Stirone* v. *United States*, 361 U.S. 212, 216, 218-219. But even if this were not so, that court's action approving the trial court's switch of theories is of itself sufficient to warrant review. While, in our view, the decision below on this issue conflicts in principle with this Court's hold-

[30] Since *Ruffalo* was a disbarment proceeding, it was not even necessary to rely upon the possibility of prejudice if the impact of the prosecutor's case on the jury is left unanswered during the period of the continuance. The court of appeals' reasoning in this case would require a defendant to risk this prejudice in order to obtain any relief where the theory of the charge against him is reversed mid-trial.

ings in *Russell* v. *United States*, 369 U.S. 749, 763-766, *In re Ruffalo*, U.S. (April 8, 1968), and *United States* v. *Fruehauf*, 365 U.S. 146, 157-158, it is in any event an important question of federal law which has not been, but should be, decided by this Court.

III

Petitioners Were Denied a Fair Trial

A. The Trial Court's Denial of Severance

The trial court's denial of developer-defendants' motion to sever their trial from that of defendant Leigh made it impossible for them to call Leigh to the stand.[31] Yet if Leigh had testified, he would have explained that his check to Cotten was for a wholly innocent, lawful purpose—the payment of a legal fee (CA 93, 96-97). Such testimony would have exculpated Cotten; and since the jury was allowed to convict all petitioners if it found that the Cotten check was a use of the mails in violation of the statute (Pet. App. 5a), reversal as to Cotten would have required a new trial as to all.[32] While petitioners had a constitutional right "to present [their] own witnesses to establish a defense," *Wash-*

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[31] The Fifth Amendment guarantees to a defendant in a criminal case the right to remain silent, and to be free from comment thereon. *Griffin* v. *California*, 380 U.S. 609. Even comment by a co-defendant is a denial of this privilege. *United States* v. *Housing Foundation of America, Inc.*, 176 F.2d 665, 666 (3 Cir. 1949); *United States* v. *Keenan*, 267 F.2d 118, 126 (7 Cir. 1959); *cert. denied*, 361 U.S. 863 (1959); *United States* v. *Benjamin*, 120 F.2d 521, 522 (2 Cir. 1941); *Poretto* v. *United States*, 196 F.2d 392, 394 (5 Cir. 1952).

[32] *Sunkist Growers* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30; *Yates* v. *United States*, 354 U.S. 298, 311-312; *Cramer* v. *United States*, 325 U.S. 1, 36, n. 45; *Stromberg v. California*, 283 U.S. 359, 367-368.

ington v. *Texas*, 388 U.S. 14, 19, denial of their severance motion effectively negated it.

The decision below, rejecting this point as being "without merit" (Pet. App. 10a), is in conflict with the holdings in *United States* v. *Echeles*, 352 F. 2d 892, 898 (7 Cir. 1965), and *DeLuna* v. *United States*, 308 F. 2d 140, 153 (5 Cir. 1962). Moreover, since the trial court denied severance on the ground that petitioners failed to obtain an exculpatory statement from Leigh "taking the onus himself * * *" (CA 96), it conditioned severance on Leigh's waiver of his Fifth Amendment rights.

Surely, in view of the conflicting holdings among the circuits on this issue, the decision below points up the compelling need for standards to guide the exercise of the trial courts' discretion. In this area of recurring difficulty,[33] the proper accommodation of the conflicting constitutional rights of different defendants (Leigh's right to refuse to be a witness in a joint trial with petitioners; petitioners' right to call Leigh as a witness where he is tried separately) presents a problem particularly suited for this Court's determination.

B. The Trial Court's Refusal To Limit Post-Conspiracy Declarations to the Particular Declarant

IRS agent Hutnick was called by the prosecution to testify concerning a conversation had with petitioner Wechsler in 1965 (CA 242-245) although, even according to the Government, the conspiracy terminated on July 25, 1962. Before this testimony was received,

[33] Cf. *Earl* v. *United States*, 364 F.2d 666 (D.C. Cir. 1966), statement of Leventhal, Bazelon, Fahy and Wright, JJ., *cert. denied*, 388 U.S. 921.

counsel asked for a limiting instruction (CA 240). The trial court responded as follows:

> "Insofar as it is limited to 1965, it is limited to Mr. Wechsler, if it refers to matters occurring during the period of the charge, then it can be considered by the jury in connection with all of the defendants in determining whether there was a conspiracy and whether they ever became a member thereof" (CA 240-241).

When counsel immediately voiced objection (CA 241), the trial court repeated his original instruction (CA 241-242). Counsel persisted in their objection (CA 242), pointing out that "whether it refers back or not," it could only apply to petitioner Wechsler (CA 242), whereupon the trial court said: "We will give you plenty of time to argue that instruction and the charge at that time. Now is not the time to do it" (CA 242). Counsel then asked for the appropriate limiting instruction with regard to the Hutnick-Goldblatt conversation (CA 246) and the trial court said: "All right. Go ahead" (CA 246). Counsel later asked for the same instruction with regard to the Hutnick-Burrage[34] conversation (CA 250), and this time the trial court said: "All right. It applies to all of them if after that period" (CA 250).

Each of these limiting instructions was contrary to the rule that when "such a declaration is made by a conspirator *after the termination of the conspiracy, it may be used only against the declarant and under appropriate instructions to the jury.*" *Delli Paoli* v. *United States*, 352 U.S. 232, 237 (emphasis in original).

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[34] Burrage was acquitted by the trial Court at the close of the Government's case.

Neither the language nor the reasoning of this Court's decisions leaves room for the trial court's view that such declarations are "admissible as against [other] conspirators if the facts contained in the statement are concurrent in time or relate back to the conspiracy." See *Yokely* v. *United States*, 237 F. 2d 455, 457 (9 Cir. 1956), reversing for the same error which the Fourth Circuit left unremedied in this case.

Despite the repeated objections of counsel, the trial court also failed to follow the admonition of *Lutwak* v. *United States*, 344 U.S. 604, 618, that "the court must be careful *at the time of the admission* and by its instruction to make it clear that the evidence is limited as against the declarant only" (emphasis supplied). See also *Delli Paoli*, *supra*, 352 U.S. at 238-241; *Yokely*, *supra*, 237 F. 2d at 458.

By holding petitioners' appeal from these errors to be "without merit' (Pet. App. 10a), the court below sanctioned a departure from procedures long-established by this Court and encouraged the Government to indulge in other experiments with the rights of defendants in conspiracy cases.

C. The Trial Court Prevented Petitioners From Developing Their Defense

The trial court's exclusion of the DeMik testimony *supra*, pp. 11-12) was error. And in numerous other cases,[35] exclusion of such testimony has been held *re-*

[35] *E.g*, *Worthington* v. *United States*, 64 F.2d 936, 941-942 (7 Cir. 1933); *Hartman* v. *United States*, 215 F.2d 386, 394 (8 Cir. 1954); *Frank* v. *United States*, 220 F.2d 559, 563-564 (10 Cir. 1955); *Continental-Baking Company* v. *United States*, 281 F.2d 137 (6 Cir. 1960); *United States* v. *Shavin*, 287 F.2d 647, 652-654 (7 Cir. 1961); *United States* v. *Dunn*, 299 F.2d 548, 555-556 (6 Cir. 1962).

versible error. Yet the Government, conceding that the ruling was wrong, persuaded the court below that it was "harmless error" under 28 U.S.C. § 2111 (Pet. App. 7a). The ruling below not only conflicts with the cases cited in footnote 35, *supra,* but raises a substantial question as to the standard to be applied in determining whether error is "harmless" under 28 U.S.C. § 2111, *i.e.,* whether non-constitutional errors in the federal courts are to be treated like constitutional errors in the state courts under *Chapman* v. *California,* 386 U.S. 18, 24. The rule there stated was, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Because *Chapman* arose out of a state court, this Court was not called upon to decide whether the same test would apply with respect to non-constitutional errors in federal prosecutions. However, the Court stated that the rule which it was establishing was the common-law harmless error rule, and equated it with the rule under 28 U.S.C. § 2111 itself. 386 U.S. at 23-24. That statute does not distinguish between errors of a different nature; nor does the degree of prejudice to a fair trial depend on whether the error stems from denial of constitutional right. Moreover, coexistence of two separate formulas for harmless error would introduce unnecessary complexities into the review of federal prosecutions. Indeed, since the line between constitutional and nonconstitutional errors is not always clear, existence of a dual standard would frequently require courts to make constitutional decisions as a predicate for choosing between two "harmless error" formulas.

The court below plainly did not determine that the trial court's ruling on the DeMik testimony was harmless beyond a reasonable doubt. Rather, it engaged in fairly elaborate and speculative reasoning (Pet. App. 7a) to reach the conclusion that it was merely "harmless". Accordingly, if the *Chapman* rule is a correct formulation of the test under the federal harmless-error statute, the judgment below cannot stand.

This is not a case where guilt plainly appears from the record. The Government's case depended upon a showing that what on its face appeared to be payment of a legal fee was, in reality, the transmission of a bribe. Whether the "harmless error" statute can ever excuse rejection of competent evidence by which the defense seeks to explain such an ambiguous transaction is a recurring and important question of judicial administration which this Court should now decide.

CONCLUSION

United States v. *Nardello,* No. 1277, this Term, involves the construction of § 1952(a)(3) in relation to state law. So does this case. The fact that both are in this Court simultaneously is persuasive evidence of the need for an authoritative determination of this important federal statute. Where, in addition, the court below affirmed petitioners' convictions for non-existent crimes, countenanced an amendment of the indictment, and ignored both the deprivation of petitioners' Fifth and Sixth Amendment rights and a series of other errors denying a fair trial, surely the questions petitioners raise are ones this Court should decide.

By reason of the foregoing, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 11,331, *et al.*

UNITED STATES OF AMERICA, *Appellee*,

v.

NATHAN WECHSLER, GEORGE FAIGEN, SEYMOUR FAIGEN, ROBERT C. COTTEN, JR., SIGMUND GOLDBLATT, and A. CLAIBORNE LEIGH, *Appellants*.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Argued November 7, 1967. Decided February 5, 1968.)

Before Haynsworth, Chief Judge, and Winter and Craven, Circuit Judges.

CRAVEN, Circuit Judge:

Involved here is a scheme by certain partners in a real estate development company (Nathan Wechsler, Sigmund Goldblatt, George Faigen, and Seymour Faigen) to bribe two members of the Board of Supervisors of Fairfax County, Virginia, (Robert Cotten and Claiborne Leigh) to vote for the re-zoning of land in which the partnership

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 11,331, *et al.*

UNITED STATES OF AMERICA, *Appellee,*

v.

NATHAN WECHSLER, GEORGE FAIGEN, SEYMOUR FAIGEN, ROBERT C. COTTEN, JR., SIGMUND GOLBLATT, and A. CLAIBORNE LEIGH, *Appellants.*

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Argued November 7, 1967. Decided February 5, 1968.)

Before Haynsworth, Chief Judge, and Winter and Craven, Circuit Judges.

CRAVEN, Circuit Judge:

Involved here is a scheme by certain partners in a real estate development company (Nathan Wechsler, Sigmund Goldblatt, George Faigen, and Seymour Faigen) to bribe two members of the Board of Supervisors of Fairfax County, Virginia, (Robert Cotten and Claiborne Leigh) to vote for the re-zoning of land in which the partnership was interested. Goldblatt, Cotten, Leigh and George Faigen appeal from their convictions for substantively violating 18 U.S.C.A. § 1952(a)(3) and for conspiring to violate the same statute; Wechsler and Seymour Faigen were acquitted on the substantive count and appeal from their convictions on the conspiracy count. The central question presented is whether the offense of using a facility in inter-

state commerce to promote, manage, establish, or carry on bribery and thereafter performing an act to promote, manage, establish, or carry on bribery is to be equated with, and limited by, the state law of bribery. We think not and affirm the convictions of all appellants.

In 1960, the developer-defendants were interested in procuring a zoning change from residential to mobile homes for 84.3 acres of land in Fairfax County which they wanted to use as a trailer park. Sufficient evidence was introduced at trial for the jury to find the following facts. On March 9, 1960, George Faigen filed an application for the re-zoning. A year later, but before the Board of Supervisors had acted upon the application, the four defendant-partners placed a check for $5,500 in escrow in the Security Bank of Washington for John C. Somers, an attorney who often handled zoning cases in Fairfax County on a contingent fee basis, conditioned upon favorable action by the Board. Two months later, on July 26, 1961, the Board acted favorably on Faigen's application on the affirmative votes of Leigh, Cotten, DeBell [1] and another. On August 7, the developer-defendants instructed the Security Bank to release the $5,500 check to Somers who deposited it to his own account on August 18, the day on which he was notified by the bank. Somers was instructed by Leigh to run the check through his own account and then make out a check for the same amount to Leigh, and did so. Somers had performed no work for developer defendants at any time, and in 1961 he knew none of them except Goldblatt.[2] Leigh deposited the check to his account on August 19, and on August 22 he wrote a check to DeBell for $1,308.33; on August 23, he wrote a check to himself for $1,333;

[1] Acquitted below.

[2] Somers also testified that he had not reported the check as income on his 1961 tax return and that he had invoked the Fifth Amendment six times before the Grand Jury after which he had been given immunity.

and on September 9, he wrote a check to Cotten for $1,000. Cotten's secretary entered the $1,000 check as a legal fee in Cotten's checkbook and receipts book and deposited the check to Cotten's account on September 15. On September 13, 1961, Congress enacted 18 U.S.C. § 1952. Because the state courts of Virginia set aside the original Board action, it was necessary for George Faigen to file a new application on June 20, 1962. This second application was considered by the Board on July 25, 1962, and again it was approved, this time on the affirmative votes of Cotten, Leigh, DeBell, and two others. Three letters, two by Goldblatt and one by George Faigen, connected with the effort to procure the re-zoning were mailed on June 17 and 18 and on July 21, 1962.

The most serious argument advanced by the appellants, and the one on which most of their other arguments depend, is that their crime was complete before the statute was enacted. We disagree. Their theory is that under Virginia law the crime of bribery is complete upon the giving, offering, or promising of a bribe even though the official act to be done in consideration therefore is to occur in futuro. The fallacy in their argument lies in a too heavy reliance on state law. The state crime serves "only as a background identification of the unlawful activities." *United States* v. *Wingo*, ... F.2d ... (6th Cir. 1967) *United States* v. *Kubacki*, 237 F. Supp. 638, 643 (E.D. Pa. 1965). We have no doubt that when the money passed, if not before, the state law of bribery had been violated and that appellants could then have been indicted in the state courts; in that sense their crime was *complete*. But, their crime was not yet completed. Their activities continued beyond that point and indeed, beyond the date on which the statute was enacted. The manifest purpose of the statute is to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials. The wrong was not done to the people until the re-zoning was accomplished and the accomplish-

ment of that wrong, after the use of a facility in interstate commerce, is one of the activities at which the statute is aimed. Thus, the *federal* crime continued until the re-zoning was accomplished on July 25, 1962.

The statute was enacted on September 13, 1961; on September 15, Cotten caused the check from Leigh to be deposited in his bank account, and the jury could have found that this check was in payment for Cotten's vote. Depositing that check in a bank for collection was the use of a "facility in interstate or foreign commerce."[3] On July 25, 1962, Cotten voted in favor of the re-zoning. Thus, he used a facility in interstate commerce to facilitate the carrying on of bribery and *thereafter* performed the carrying on of bribery, squarely within the terms of the statute, after the statute was enacted. As applied to Cotten, then, the statute had no ex post facto effect.

By the same token, the conspiracy convictions of each of the appellants must be affirmed. Appellants argue that a new trial is necessitated by the trial judge's instruction that the jury could convict if one of the conspirators com-

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[3] When one deposits a check, there would seem to be little doubt that he is using a facility in interstate commerce. Banks have often been held to be involved in interstate commerce for other purposes. *E.g., NLRB* v. *Bank of America*, 130 F. 2d 624 (9th Cir. 1942) (National Labor Relations Act); *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N.D. Cal. 1942) (Fair Labor Standards Act). Moreover, Government Exhibit No. 12, the check from Leigh to Cotten, shows that the check was drawn on a Virginia bank and bears the endorsement of a Washington, D.C. bank. Nor do we doubt that the evidence was sufficient for the jury to find the requisite statutory intent. *See, United States* v. *Wingo*, — F. 2d — (6th Cir. 1967). To paraphrase our holding in an analagous situation, there must be some connection between the unlawful activity and the use of a facility in interstate commerce, but "we think it sufficient under section 1952 that the defendant knowingly caused to be transmitted interstate . . . proceeds of a [bribery] which was unlawful under the [Virginia] statute." *United States* v. *Hawthorne*, 356 F. 2d 740, 742 (4th Cir. 1966).

mitted any of the several overt acts charged in the indictment, several of which were not acts in furtherance of *bribery* and occurred, under appellants' theory, after the conspiracy had ended. But in order to have convicted Cotten of the substantive offense, the jury must have found that he deposited his check from Leigh, and this was one of the overt acts to which the trial judge referred. Each member of the conspiracy is chargeable with acts performed by other members in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640 (1946).[4] Further, appellants were not charged with a conspiracy to commit *bribery*, but with a conspiracy to violate 18 U.S.C. § 1952.[5] Each of the overt acts listed in the indictment were acts which would have furthered this conspiracy and each was performed after the statute was enacted and before the conspiracy ended, according to our holding, on July 25, 1962, when the Board acted affirmatively on the re-zoning application.

On the other hand, rather serious problems are raised in connection with the substantive convictions of each of the appellants other than Cotten. But because we affirm their conspiracy convictions and because the sentences on each

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[4] Since Seymour Faigen has been acquitted of the substantive count and since the punishment of the other appellants would not be affected, we decline to consider whether Cotten's commission of the substantive offense was in furtherance of the conspiracy so as to make all conspirators equally liable for the substantive offense as well as the conspiracy. *See, Pinkerton* v. *United States, id.* at 647; *United States* v. *McGuire*, 249 F. Supp. 43, 48 (S.D.N.Y. 1965).

[5] Appellants seriously urge that at the outset the trial judge construed Count I of the indictment to mean that they were charged with a conspiracy to commit bribery, and that later the theory was switched to read Count I as charging them with a conspiracy to procure a re-zoning by means of bribery. Since the indictment quite clearly charges a conspiracy to violate § 1952, such a switch, if indeed it occurred, would have entitled appellants to no more than a continuance on the grounds of surprise. No such motion was made.

count are to run concurrently, a reversal of the substantive convictions would be fruitless. We, thus, find it unnecessary to resolve those problems.[6] *Hirabayashi* v. *United States*, 320 U.S. 81, 85 (1943); *Gorin* v. *United States*, 312 U.S. 19, 33 (1941); *Brooks* v. *United States*, 267 U.S. 432, 441 (1925).

Many of the other arguments advanced by appellants are dependent upon the answer to the problem just discussed and, hence, fall with the statutory construction that we have adopted. However, there remain two arguments that merit brief mention. Appellant Leigh urges that it was error for the trial judge to require the defendants to agree on a trial location within the Eastern District of Virginia as a condition for fixing the place of trial somewhere within the district other than Alexandria under Fed. R. Crim. P. 18. But a motion for change of venue under Fed. R. Crim. P. 21(a) had already been denied; the condition was merely an attempt by the trial court to accommodate the defendants in keeping with the rule's mandate that the place of trial is to be fixed within

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[6] While we do not decide the question, we note that there is a serious question as to whether any of the appellants, other than Cotten, used a facility in interstate commerce and *thereafter* performed an act prohibited by the statute. Sigmund Goldblatt and George Faigen both wrote and mailed letters after the date of the statute, but it is seriously urged that the only act that they can be said to have performed *thereafter* is the appearance of Lytton Gibson, an attorney, before the Board of Supervisors on behalf of the partnership. Although traditional agency concepts might support the theory that Gibson's act was the act of each of the partners, ordinarily such an appearance is precisely the kind of activity in which, as the trial judge charged, any citizen has the right to engage; there is serious doubt that this act was shown to be one which was done to promote bribery. Conversely, Claiborne Leigh was shown to have performed an act after the statute was enacted (i.e., his vote), but it is doubtful that he was shown to have made use of a facility in interstate commerce before that act and after the effective date of the statute.

the district "with due regard to the convenience of the defendant and the witnesses."

Second, appellants contend that it was error for the trial judge to limit the testimony of William DeMik, an attorney. DeMik, on direct examination, testified that Wechsler had asked him about Somers, that he had investigated and had reported to Wechsler that Somers was an attorney who was extremely well connected with the Board of Supervisors. He was then asked if he had given Wechsler any advice; at that point the trial judge interrupted and *sua sponte* interposed an objection. The offer of proof was that DeMik would testify that he had advised Wechsler to settle with Somers thus supporting defendants' theory that the $5,500 had been put in escrow as settlement of a legal fee due to Somers. We find it unnecessary to decide if exclusion of this testimony was error, for we find no effect on the substantial rights of the parties within the meaning of 28 U.S.C.A. § 2111. Dobrow, the fifth partner, testified that Somers had been employed as an attorney to assist in the zoning, that a fee of $15,500 had been discussed, that Wechsler had been delegated by the partners to annul the preliminary arrangements after Gibson, another attorney retained to work on the same matter, had refused to work with Somers, and that a $5,500 settlement had been arranged with Somers. Further, another witness testified that he had told Wechsler, after investigating, that Somers was a person not without influence and that he was reasonably certain that Somers "could be somewhat harmful." There is, then, very little that DeMik's testimony could have added to the jury's knowledge. Moreover, the contentions of the defendants were carefully spelled out in the charge to the jury. In these circumstances, we can find no prejudice justifying a new trial. See, *Harper* v. *United States,* 143 F.2d 795, 806 (8th Cir. 1944).

We have carefully considered the other numerous arguments advanced on behalf of all applicants and find them to be without merit.

Affirmed.

WINTER, Circuit Judge, dissenting:

I agree wholeheartedly that one of the general purposes of Congress in the enactment of 18 U.S.C.A. § 1952 was "to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials." But in seeking to punish this class of wrongdoers, the government must be held to the exact class of transgressors whose activities Congress outlawed. To my mind, these defendants do not fall into this group.

The facts need not be extensively restated; only certain dates should be pointed up. The $5,500 bribe to accomplish favorable rezoning of the tract in question was removed from escrow and deposited to Somers' bank account on August 18, 1961. The next day it went into Leigh's bank account. From there, shares were disbursed to the three public officials who accomplished the rezoning. Specifically, one of them, Bell (who was acquitted at the trial) received a check in payment on August 22, 1961; Leigh, one of the others, made disbursement to himself on August 23, 1961; and the final payment was made to a third, Cotten, by check dated September 9, 1961. Cotten's bookkeeper did not deposit Cotten's check until September 15, 1961. Meanwhile, § 1952 became effective September 13, 1961. Because the initial rezoning was set aside by the courts, repetition of the rezoning, *but without the payment of any additional bribe,* took place in June and July, 1962. In connection with the second rezoning, the United States mails were used on June 17 and 18 and on July 21, 1962.

The statute, which was the basis of the substantive count of the indictment and the violation of which was the object of the alleged conspiracy in the conspiracy count of

the indictment, is set forth in the margin.[1] So far as pertinent here, the statute makes unlawful the conduct of one who uses any facility in interstate or foreign commerce, including the mail, *with intent to promote,* manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of *bribery in violation of the laws of the Commonwealth of Virginia* and thereafter performs or attempts to perform the crime of bribery in violation of those laws. The Virginia statutes defining the criminal conduct constituting bribery are likewise set forth

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[1] 18 U.S.C.A.

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * *"

in the margin.[2] It is clear under Virginia law, as the majority tacitly concedes, that the latest point in time at which the crime of bribery is complete is *not* when the public

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[2] 4 Code of Virginia (1960 Repl. Vol.):

"§ 18.1-278. Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment, on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years. This section shall also apply to a resident of this State who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise and thereafter return to this State.

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"§ 18.1-279. Acceptance thereof by officer.—If any executive, legislative or judicial officer, sheriff or police officer, or any candidate for such office, accept in this State, or if, being resident in this State, such officer or candidate shall go out of this State and accept and afterwards return to and reside in this State, any gift or gratuity or any promise to make a gift or do any act beneficial to such officer or candidate under an agreement, or with an understanding, that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may be by law brought before him in his official capacity or that in such capacity he shall make any particular nomination or appointment or take or fail to take any particular action or perform any duty required by law, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years and shall forfeit his office and be forever incapable of holding any post mentioned in § 2-26. The word candidate as used in this and the preceding section shall mean anyone who offers himself or is put forward by others as a suitable person or an aspirant for such office."

official commits the act for which he is bribed, but when the bribe is given and the official accepts the bribe payment.[3]

The essential difference between me and the majority is that I think that the statute means what it says when it requires that the use of interstate facilities be accompanied by an intent to violate state law. Both *United States* v. *Wingo*, ... F.2d ... (6 Cir. 1967), and *United States* v. *Kubacki*, 237 F. S. 638 (E.D. Pa. 1965), support this position.[4] But in contravention of these authorities—and

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[3] Of course, the Virginia statute also permits a prosecution based on events which occur earlier than the completed transaction, i.e., the offer to give a bribe, and the agreement to accept one. *Ford* v. *Commonwealth*, 177 Va. 889, 15 S.E. 2d 50 (1940). For present purposes, however, my concern is properly directed only to the latest point in a complete transaction that criminality attaches.

[4] The "background identification" language in *Kubacki*, quoted in the majority opinion, must be placed in its proper context. It was not held in *Kubacki*, as the majority holds here, that it is unnecessary in determining whether § 1952 has been violated to examine the specific scope of the state law which the defendant is charged with having the intent to violate when using facilities of interstate commerce. To the contrary, an essential element of the holding in *Kubacki* is that under Pennsylvania law the crime of extortion is not completed until the actual payment is made, and that this payment was made after September 13, 1961. See 237 F. S. at 643 n. 7. The reasoning of the court was that although the public wrong effected by the extortion—the award of a parking meter contract—occurred before the effective date of § 1952, the illicit course of conduct under state law was not completed until the actual payment was made, and that, therefore, the use of facilities of interstate commerce after September 13 was made with the requisite intent to *violate state law*. Thus, the court stated:

> "Upon the adoption of § 1952 on September 13, 1961, the plan, contemplating as it did use of interstate facilities and interstate travel, became an unlawful conspiracy under federal law. Membership of the defendants in the theretofore federally innocent plan was then converted to membership in an unlawful conspiracy. *That conspiracy continued until the accom-*

the plain language of § 1952—the majority apparently deems that use of interstate facilities in the loose context

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plishment of the last of its objects, delivery of the money and the clock. Id., at 643. (emphasis supplied)

The underscored language makes it clear that after the state crime of extortion had been completed by the making of the actual payment, the conspiracy to violate § 1952 must also necessarily terminate.

Similarly, *United States* v. *Wingo*, — F. 2d — (6 Cir. 1967), provides no support for the majority's approach of defining "unlawful activities" as used in § 1952 in federal terms, rather than according to state law. Indeed, in that case, which involved "travel in interstate commerce" to distribute the proceeds of prostitution, the Court explicitly recognized that "we are concerned by the terms of the statute [§ 1952] with an enterprise *unlawful under the laws of Tennessee.*" *Id.*, at —. And although the Court paraphrased the "background identification" language used in *Kubacki*, the context in which these words are used indicates that the Court meant something far different from what the majority suggests.

> "At this point it becomes necessary to determine what the Travel Act requires in the form of intent. Under § 1952, travel, with a requisite intent plus a subsequent act in furtherance of that intent, would be all that is required to make out a violation. *United States* v. *Bergland*, 318 F. 2d 159 (7 Cir. 1963) cert. den., *Cantrell, et al* v. *United States*, 375 U.S. 861 (1963). The state crimes serve only as a background identification of the unlawful activities *in aid of which the proscribed travel was undertaken. United States* v. *Kubacki*, 237 F. Supp. 639 (E.D. Pa., 1965). The words 'with intent' obviously refer to the words immediately following, namely 'to * * * distribute the proceeds of any unlawful activity.'" (emphasis supplied)

The difference in the "intent" required in *Wingo* and that required here is explained simply by the fact that the indictments in *Wingo* were brought under § 1952(a)(1), while the indictments in the instant case were brought under § 1952(a)(3). For present purposes, the critical aspect of the language in *Wingo* is that the Court considered that state law provides "background identification" to § 1952(a)(1) only in the sense that the gravamen of the federal offense is the use of interstate facilities with the intent to distribute the proceeds of an unlawful activity, *defined by state law.*

of some past violation of state law is sufficient, if subsequent conduct of the defendants can be said to violate the general purpose of § 1952 to protect the people from corruption of public officials.

The error of the majority is one of statutory interpretation, but as such it reaches constitutional magnitude. Under the operative facts as stated by the majority and repeated here, there can be no question (putting aside for the moment the check given to Cotten) but that the Virginia crimes of bribery and acceptance of a bribe were "complete and completed" prior to September 13, 1961—the effective date of § 1952. As will be later shown, the check given to Cotten requires no different conclusion. If the government had sought a conviction on the basis of the use of interstate facilities prior to September 13, 1961, so as to prove such use accompanied by the intent which § 1952 specifically requires, clearly the government would be seeking to give § 1952 retroactive application.[5] This the government could not do. U. S. Constitution, Art. I, § 9; *Bouie* v. *Columbia*, 378 U. S. 347 (1964). In allowing the government to circumvent this problem by reliance on uses of interstate facilities occurring after September 13, 1961, the majority has denied due process of law, because it has created by judicial fiat a federal crime not brought into existence by § 1952 itself, "the use of interstate facilities with intent to promote an illegal zoning.". Such judicial enlargement of a penal statute, if applied retroactively, has the same effect as legislative enactment of an *ex post facto* law, which is constitutionally prohibited both to the states and to Congress (U. S. Constitution, Art. I, §§ 9 and 10), and has been held to violate the due process amendments. *Bouie* v. *Columbia, supra*. Because any use

[5] As particularized, the indictment charges that the use of interstate facilities by use of the United States mails between the Commonwealth of Virginia and Washington, D.C. occurred on or about September 20, 1961, October 11 and 12, 1961, October 22, 1961, November 28, 1961, and July 17 and 18, 1962.

of interstate facilities to promote an illegal zoning was federally innocent—even if it occurred after September 13, 1961—before the majority's decision in this case, the violation of due process follows.

Any doubt about the construction to be afforded § 1952 is allayed by reference to *Kann* v. *United States,* 323 U. S. 88 (1944), and *Parr* v. *United States,* 363 U. S. 370 (1960), both of which arose under the mail fraud statute. In *Kann* the defendants perpetrated a fraudulent scheme, pursuant to which they obtained checks payable to them, which they cashed or deposited at a bank. The use of the mails charged as a violation of the federal statute was the mailing of the checks for collection by the banks which cashed them to the banks on which they were drawn. Prior to that mailing, the defendants had obtained effective control over the money which they sought and, as far as they were concerned, their fraudulent plan had reached its fruition and come to a complete rest. The mailing was done by the banks, which had no connection whatsoever with the fraud. The checks were mailed for the bank's own purposes. On these facts it was held that the defendants could not be convicted for violation of the mail fraud statute, because the mailing did not occur with the requisite intent to defraud.

In *Parr* the defendants obtained gasoline and other products and services for themselves by the use of a credit card of a School District which had authorized the defendants to use the card for the District's purposes only. The mailings complained of were two invoices sent by the oil company to the District, and the District's check mailed back in payment. Again, it was found that the mailings by the outsiders were not an integral part of the scheme as planned and executed by the defendants, and that, as a matter of fact, it was completely immaterial to them what the oil company did about collecting its bill. As in *Kann,* the conclusion reached was that the mailing was without the requisite intent to further the scheme to defraud.

Both *Kann* and *Parr* clearly stand for the proposition that the mere concurrence of a violation of the general purpose which the relevant federal statute is designed to serve and a use of interstate facilities does not make an act, even though morally reprehensible and violative of state law, a federal crime. That Congress may have prohibited the use of interstate facilities to persons who use those facilities for the purpose of perpetrating frauds does not mean that Congress intends to outlaw that activity under federal law wherever the use of interstate facilities grants to the federal courts a jurisdictional basis to do so. *Cf. Carroll* v. *United States*, 326 F.2d 72, 85-86 (9 Cir. 1963). In this regard the following statement in *Kann* is quite pertinent: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U. S., at 94-95.

Similarly, as shown by the clear statutory language, Congress did not intend in § 1952 to reach all wrongs "on the people [effected] by corrupting public officials," but only those wrongs which are violative of specified state laws. The scope of Congressional power and whether it is sufficiently broad to make unlawful the use of interstate facilities for the purpose of corrupting state officials, is not the question. I do not doubt that the power of Congress is this broad, just as I do not doubt that Congress can reach all fraudulent schemes which employ interstate facilities regardless of intent. But our inquiry here must be whether this power was so exercised. The plain wording of § 1952 demonstrates that it was not.

The check sent to Cotten merits special scrutiny. If the bribery of Cotten was complete on September 9, the date on which he received the check, it is obvious that under my interpretation of the statute, the clearing of the check through interstate facilities after September 13 could not constitute a violation of § 1952, because (1) this use of

interstate facilities could not be made with the requisite intent to violate state law, and (2) no act in performance or attempted performance of the Virginia crime of bribery could be made *after* the use of interstate facilities, as required by § 1952. This, I think, is dispositive of the case. In the absence of evidence that Cotten knew that the check was worthless at the time he received it and delayed in making his deposit until he was informed that the check would not "bounce" (a position suggested, but not pressed by the government) there seems to be no reason to find as a matter of state law that the bribe was not completed on the date of receipt.[6] It would be unrealistic to infer repudiation of the check from mere delay in depositing it when the check was received pursuant to a prior agreement.

Assuming, however, that the bribe was not completed at the time of receipt, it seems abundantly clear that it was completed at the time of deposit. By placing the money in his own account, Cotten evidenced an unequivocal intent to "accept" the illicit benefit, the gravamen of the offense under *Va. Code Ann.* § 18.1-279. Surely, a public official could be convicted of bribery if he accepted counterfeit money, believing it to be genuine. Similarly, even if a check which he accepted turned out to be worthless, he would still have accepted a bribe. Thus, collection of the check from the drawee bank occurred *after* the bribe had been completed—even if the bribe was not accepted until the time of deposit—and, accordingly, any use of interstate facilities after that time, specifically bank clearing operations, could not constitute a violation of § 1952 for the same reasons which apply if the bribe is deemed to have been completed on September 9.

But even if it is further assumed that as a matter of state law the bribe was not completed until the check had

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[6] Indeed, the record shows that Leigh, contemporaneously with drawing his check to Cotten, voided certain previously drawn checks so that the check to Cotten would be paid by the bank when presented.

cleared, the same result should obtain, because as a matter of federal law the bank clearing operations do not constitute a use of interstate facilities as contemplated by § 1952. The specific teaching of *Kann* v. *United States, supra,* is that if the interstate mailing is merely collateral to the perpetration of a fraudulent scheme, such mailing is not sufficient to establish a violation of the mail fraud statute. Of course, subsequent decisions, e.g., *United States* v. *Sampson,* 371 U. S. 75 (1962), and *Pereira* v. *United States,* 347 U. S. 1 (1954), recognize that, under the mail fraud statute, use of the mails even after the victim's money has been obtained can be for the purpose of executing the scheme, and thus subject to prosecuton, if it is "incidental to an essential part" of the scheme. But on whatever side of the rather vague line drawn by *Kann* and its progeny the bank clearing in the instant case might fall, an important difference in the mail fraud statute and § 1952 supplies a dispositive answer. The mail fraud statute proscribes conduct where one "knowingly causes" the mail to be used for the purpose of executing the fraud, as well as use of the mail for that purpose. 18 U.S.C.A. § 1341. It was on the ground that each of the defendants "caused" the mail to be used that convictions were upheld in *Pereira* v. *United States, supra,* where the basis for prosecution was the deposit of checks. By contrast, § 1952 is limited to "uses [of] any facility in interstate or foreign commerce, including the mail." Therefore, the reasoning used in *Pereira* to limit the *Kann* holding is not applicable here.

In the expression of my views, little more need be stated. If I am correct in my interpretation of § 1952, the convictions on the substantive counts clearly cannot be supported. And if I am correct in my treatment of the substantive offenses, the conspiracy convictions, under the familiar principle that a conspiracy terminates upon the accomplishment of its unlawful objective, stand on no surer footing. *Grunewald* v. *United States,* 353 U. S. 391 (1957).

I would reverse the judgments and direct the entry of judgments of acquittal.

APPENDIX B

Article I, § 9, cl. 3 of the Constitution of the United States provides:

> No bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1952 provides, in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

* * * *

(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * * *

Virginia Code § 18.1-278 provides:

Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years. This section shall also apply to a resident of this State who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise and thereafter return to this State.

Virginia Code § 18.1-279 provides:

Acceptance thereof by officer.—If any executive, legislative or judicial officer, sheriff or police officer, or

any candidate for such office, accept in this State, or if, being resident in this State, such officer or candidate shall go out of this State and accept and afterwards return to and reside in this State, any gift or gratuity or any promise to make a gift or do any act beneficial to such officer or candidate under an agreement, or with an understanding, that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may be by law brought before him in his official capacity or that in such capacity he shall make any particular nomination or appointment or take or fail to take any particular action or perform any duty required by law, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years and shall forfeit his office and be forever incapable of holding any post mentioned in § 2-26. The word candidate as used in this and the preceding section shall mean anyone who offers himself or is put forward by others as a suitable person or an aspirant for such office.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1377

NATHAN WECHSLER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1968. A petition for rehearing was denied on March 7, 1968. On March 25, 1968, the Chief Justice extended the time for filing a petition for a writ of certiorari to April 30, 1968, and the petition was filed on April 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners could be convicted of conspiracy to violate 18 U.S.C. 1952(a)(3) by using interstate facilities in furtherance of a bribery scheme, where conduct sufficient to constitute the crime of bribery under Virginia law occurred prior to enactment of the federal statute, but the use of interstate facilities occurred after the federal statute was in effect.

2. Whether the trial court's instructions permitted the jury to convict petitioners of a crime different from that charged in the indictment.

3. Whether the trial court properly denied certain petitioners' motion to sever their case from that of petitioner Leigh.

4. Whether there was prejudicial error in evidentiary rulings of the trial court.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners George Faigen, Goldblatt, Cotten, and Leigh were convicted on both counts of an indictment charging them with conspiracy to violate, and substantive violations of, 18 U.S.C. 1952(a)(3). They were sentenced to two years' imprisonment on each count, the sentences to run concurrently. Petitioners Seymour Faigen and Wechsler were convicted only of conspiracy;[1] Wechsler was sentenced to two years' imprisonment, and Seymour Faigen was sentenced to eighteen months' imprisonment (C.A. 418–419).[2] The court of appeals affirmed, one judge dissenting (Pet. App. A).

The substance of the indictment was that petitioners

[1] Three other defendants, Lytton Gibson, Stuart DeBell, and William Burrage, were acquitted by the court at the conclusion of the government's case.

[2] "C.A." refers to the consolidated appendix in the court of appeals containing relevant portions of the proceedings in the district court. We are filing a copy of this appendix with the Clerk of this Court.

conspired to use, and did use, the facilities of interstate commerce in furtherance of a scheme whereby they bribed certain members of the Fairfax County Board of Supervisors to render a favorable decision on an application for rezoning of land in Fairfax County. The evidence showed that petitioners George and Seymour Faigen, Wechsler, and Goldblatt (developer defendants) were partners in an enterprise named Trailer Court Ventures. On March 9, 1960, George Faigen filed an application for a zoning change with respect to 84.3 acres of land in Fairfax County for use as a trailer park (C.A. 490). On April 25, 1961, the developer defendants placed $5,500 in escrow with the Security Bank of Washington for John Somers, an attorney, in payment for "professional services," contingent upon favorable action by the Board (C.A. 425). George Faigen's zoning application came before the Board on July 19, 1961, together with a related application by one Peachey (C.A. 194), and the matter was deferred for one week. Peachey testified that on July 24 George Faigen telephoned to advise that the "swing vote" (Mrs. Wilkins) had changed her mind and that "we had to pay through the nose" (C.A. 195–196). On July 26, the Faigen and Peachey applications were granted on the affirmative votes of Mrs. Wilkins, defendant DeBell, and petitioners Cotten and Leigh.[3] In August 1961 a citizens group instituted a lawsuit challenging the zoning change.

[3] Two dissenting votes were cast, and one Board member absented himself.

On August 7, 1961, the developer defendants instructed the Security Bank to release Somers' check. Somers picked up the check on August 18 and deposited it to his account (C.A. 142, 427, 497). Somers testified that petitioner Leigh had told him about the check and had asked him to run it through his account and that, at Leigh's request, he wrote Leigh a check for the same amount (C.A. 164, 166, 433).[4] Somers also testified that he performed no work for the developer defendants at any time and that he had not known them in 1961 (C.A. 164–165).

Petitioner Leigh deposited Somers' check for $5,500 in his bank on August 19, 1961 (C.A. 434). On August 22, Leigh wrote DeBell a check for $1,308.33 (C.A. 435); on August 23, he wrote himself a check for $1,333 (C.A. 436); and on September 9, he wrote a check to petitioner Cotten for $1,000 (C.A. 437).

On September 13, 1961, 18 U.S.C. 1952 became effective. On September 15, Cotten's secretary deposited his check (C.A. 222–223), which thereafter cleared through the use of interstate facilities.

On April 27, 1962, the Virginia courts invalidated the zoning change, and on June 20, George Faigen filed a new zoning application (C.A. 141). Three letters in connection with this application (two from petitioner Goldblatt to attorney Lytton Gibson and

[4] Leigh and Somers had shared a law office when Somers first entered into legal practice (C.A. 167). Somers testified that he assumed the transaction was in aid of a lawful business venture in which Leigh did not wish his identity to be known (C.A. 177).

one from George Faigen to Gibson) were admitted into evidence (C.A. 467, 469, 472). The zoning application was granted (with minor modifications to alleviate the prior legal defect) on July 25, 1962, on the affirmative votes of Mrs. Wilkins, defendant DeBell, petitioners Cotten and Leigh, and one other Board member.

Petitioners' defense was that they had hired Somers to represent them on their original zoning application, together with Lytton Gibson, and that the $5,500 check was in payment for Somers' services.

ARGUMENT

1. Petitioners argue that the crime of bribery under Virginia law had been completed when the $1,000 check to Supervisor Cotten was delivered, and that there was no evidence that this check had been delivered after September 13, 1961, when 18 U.S.C. 1952 became law.[5] Even though Cotten obtained payment on the check through the use of interstate facilities after September 13, 1961, thus satisfying the developers' obligation under the bribery scheme to obtain a favorable decision on their rezoning application, petitioners contend that this use of interstate facilities cannot support a conviction under Section 1952 because it was not in furtherance of any "unlawful activity," defined in the statute as "bribery * * * in violation of the laws of the State in which committed."

[5] No proof was introduced before the jury as to when Cotten's check from Leigh was delivered. Cotten and Leigh submitted affidavits in connection with their motion to dismiss the indictment, stating that the check had been personally delivered on September 9, 1961 (C.A. 43–44).

The court below properly rejected that contention as an unwarranted application of State law to limit the reach of the federal statute. We do not disagree with petitioners' lengthy argument (Pet. 15–21) that Section 1952 incorporates the elements of bribery under State law as the substance of the conduct which may not be carried on through the use of interstate commerce facilities. But that is not conclusive of the issue presented here; it does not follow that Section 1952 should be construed, as petitioners apparently contend, as a precise reflection of the various State bribery statutes.

One of the principal purposes of Section 1952 is to assist the States in the enforcement of their laws against bribery and extortion. See H. Rep. No. 966, 87th Cong., 1st Sess. As we stated in our Jurisdictional Statement in *United States* v. *Nardello* (No. 1277, this Term, p. 7): "The objective of assisting state law enforcement efforts is reflected in the withholding of federal penalties for conduct which is not an offense at all under state law." But that does not mean that the reach of the federal statute is to be circumscribed by the events to which each State determines its local prosecution should attach. Petitioners cite no authority which would support the position that Congress contemplated that prosecution under Section 1952 cannot be mantained if the minimum conduct necessary to sustain a State bribery conviction occurs prior to the use of interstate facilities in furtherance of the bribery scheme. Indeed, the language which Congress used in Section 1952 sug-

gests the contrary.* The wording of Section 1952(a)(3)—prohibiting the use of interstate facilities with intent to "otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of * * * [bribery]"—indicates that the focus of the federal statute is the entire enterprise having as its purpose the corruption of State officials in violation of the State's laws against bribery. *United States* v. *Kubacki*, 237 F. Supp. 638, 642–643 (E.D. Pa.). It can hardly be denied that an essential element of the conspiracy proved here was that petitioner Cotten was to enjoy the promised compensation for his vote—which was accomplished through the use of interstate facilities after Section 1952 became effective.

Moreover, the fact that Virginia has determined that petitioners' conduct should be subject to prosecution at the time their offer of the bribe or the acceptance was made does not mean that Virginia has no interest in petitioners' subsequent activities designed to effectuate the unlawful scheme. The effect of the bribery on the State's governmental process continues so long as the transaction has not been completed on

*See 18 U.S.C. 1952(a)(1), prohibiting the use of interstate facilities with intent to "distribute the proceeds of any unlawful activity." Unless the distribution of proceeds constituted an element of the State's laws against bribery or extortion, the conduct prohibited by the federal statute would necessarily occur after the completion of the substantive State offense. Compare 18 U.S.C. 1952(a)(2), prohibitng the use of interstate facilities with intent "*to * * * commit* any crime of violence" (emphasis added), with 18 U.S.C. 1952(a)(3), quoted in the text.

both sides, for throughout that period, the payment of money will continue to influence official action. The holding of the court below—that a conspiracy to violate Section 1952 may be evidenced by the use of an interstate facility during the period of the bribery scheme—permits the federal statute to serve its intended purpose of aiding the enforcement of Virginia's laws.

Finally, disposition of the present petition is unrelated to the pendency of the appeal in *United States* v. *Nardello*, No. 1277, this Term. An appeal was taken in *Nardello* because the district court's construction of Section 1952, as not applying to acts of extortion by private persons because such conduct is punishable as blackmail under the Pennsylvania Penal Code, would seriously impair its applicability to extortionate activities in more than one-third of the States, where that type of conduct is prohibited under a different name. The controversy in the present case was occasioned primarily by the fact that Section 1952 was enacted after the bribery scheme had been initiated, and, with the passage of time, is less likely to recur. In addition, the holding of the majority is in accord with the construction given the statute by the only other court to have considered the question. *United States* v. *Kubacki*, 237 F. Supp. 638, 642–643 (E.D. Pa.); cf. *McIntosh* v. *United States*, 385 F. 2d 274 (C.A. 8).[7]

[7] The opinion in *United States* v. *Wingo* (C.A. 6, decided September 27, 1967), cited by both the majority and the dissent below, was withdrawn by the court on December 8, 1967. A new opinion, issued by the Sixth Circuit *en banc* on April 12, 1968, contains no discussion pertinent to the issue here.

2. Petitioners contend (Pet. 22–26) that they were convicted of a crime not charged in the indictment, or on a theory of the crime different from that originally stated by the trial judge. This argument is based upon the fact that the trial court referred to the "unlawful activity" charged in the indictment as "bribery" or "bribery * * * in re zoning activities" (C.A. 89–91, 119) in describing the charge to prospective jurors on the *voir dire* and in discussions with counsel through the close of the government's case, and subsequently as "obtaining a zoning * * * via bribery" (C.A. 369; see also C.A. 347, 359–360) in its instructions to the jury. Petitioners' attempt to magnify this difference in form of expression into a ground for reversal was properly rejected by the court below.

Petitioners' contention that the court's instruction permitted the jury to convict them of a crime not charged in the indictment is essentially a rephrasing of the argument that a conviction under Section 1952 cannot be predicated on a use of interstate facilities in furtherance of the bribery scheme after an offense under Virginia law had been completed. Our discussion in point 1 of this argument demonstrates the fallacy of that contention. With regard to the argument that the trial court's change of phraseology amounted to a "switch" in the theory of the crime, the court of appeals held that "such a switch, if indeed it occurred, would have entitled [petitioners] to

no more than a continuance on the grounds of surprise" (Pet. App. A, p. 5, n. 5). No request for a continuance was made, however, and it is apparent that petitioners were neither surprised nor prejudiced in presenting their defense. The essential issue presented to the jury, as the allegations of the indictment clearly foreshadowed, was whether the $5,500 check to Somers was in payment for legal services or was intended to be disbursed to various county supervisors in exchange for a favorable vote. The difference, if any, between the court's characterizations of the "unlawful activity" charged in the indictment was relevant, and its relevance was argued by petitioners (see *e.g.*, C.A. 282–287) only with respect to the issue of law whether the government's proof established a crime embraced within the federal statute.[8]

3. Prior to the introduction of any evidence, the developer defendants orally renewed a motion to sever the trial of petitioner Leigh. Mr. Shapiro (counsel for Goldblatt) stated that Leigh's counsel, Mr. Batchelor had informed him "that his present thinking was that his client would not take the stand in this case" (C.A. 92). Mr. Shapiro further stated that he understood that Leigh would be willing to testify for the

[8] Petitioners' reliance (Pet. 25) on *Russell* v. *United States*, 369 U.S. 749, and *Stirone* v. *United States*, 361 U.S. 212, is misplaced, since in those cases either the indictment failed to specify an element of the offense necessary to enable the defendant to prepare his defense, or the trial judge effected a prejudicial amendment of the indictment by admitting proof of an element of the offense which was not alleged in the indictment..

developer defendants[9] and to testify at his own trial, if tried separately (C.A. 93). The trial judge ruled that these representations were not a sufficient basis upon which to order a separate trial for Leigh, since even a defendant's counsel did not have the right to determine whether his client would testify (C.A. 97). The court denied the motion without prejudice to reconsideration if Leigh himself were to state that he was prepared to give exculpatory testimony on behalf of the other defendants (C.A. 96, 98). At no time did Leigh confirm Mr. Shapiro's representations.

Joint trials of co-conspirators are clearly desirable. See *Bruton* v. *United States,* No. 705, this Term (decided May 20, 1968, Slip Op. at pp. 11–12). In order to avoid a pointless severance, it was not unreasonable for the trial judge, in the exercise of his discretion, to require that Leigh personally assure the court that he was prepared to give exculpatory testimony at his co-defendants' trial. Otherwise, despite counsel's expectations, there was a likelihood that Leigh might elect to exercise his privilege against self-incrimination when called to the stand.[10]

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[9] The expected substance of Leigh's testimony was not disclosed, but petitioners now claim (Pet. 26) that Leigh would have testified that his check to petitioner Cotten was "for a wholly innocent, lawful purpose—the payment of a legal fee", and that this testimony would have exculpated all petitioners, since the jury was permitted to find them guilty if it determined that the deposit of Cotten's check was a use of interstate facilities in violation of 18 U.S.C. 1952.

[10] *United States* v. *Echeles,* 352 F. 2d 892 (C.A. 7), cited by petitioners (Pet. 27), provides no support for their position. There the court held that a severance was required where a co-defendant had three times, in open court, exculpated Echeles

4. a. William DeMik, an attorney called as a defense witness, testified that, after a conference with petitioner Wechsler in the spring of 1961, he made inquiries about Somers and reported back to Wechsler that Somers was "extremely well connected * * * with the [Fairfax] County Board" (C.A. 315–316). DeMik was then asked "Did you give Mr. Wechsler some advice?" (C.A. 316). The trial court refused to permit the question to be answered. Petitioners made an offer of proof that DeMik's answer would have been that he advised Wechsler to settle the claim with Somers (C.A. 317), thus supporting their defense that the $5,500 check to Somers was in settlement of a claim for professional services in connection with the zoning application.

The court of appeals held that it was unnecessary to determine whether exclusion of DeMik's answer was error, since the ruling did not affect petitioners' substantial rights (Pet. App. A, p. 7). That holding was correct. As the court pointed out, Lawrence Dobrow (a partner in Trailer Court Ventures) had already testified that Somers had been employed to assist in the zoning; that a fee of $15,500 had been discussed; that Wechsler had been appointed by the developer defendants to try to annul the arrangements with Somers after Gibson, the other attorney retained on the same matter, had refused to work with Somers; and that Somers' claim had been settled for $5,500

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contrary to his own penal interest (*id.* at 897–898). The present record evinces no such firm indication of a willingness on Leigh's part to give exculpatory testimony if called as a witness at petitioners' trial.

(C.A. 290–296). In addition, one Ashe had testified that he had made inquiries about Somers at Wechsler's request and had reported that Somers had influence and could be "harmful" to the zoning application (C.A. 309). DeMik's testimony was thus largely repetitive and "could have added [little] to the jury's knowledge" (Pet. App. A, p. 7).

b. Petitioners also contend that the trial court committed reversible error by failing to give proper limiting instructions in connection with the testimony of Revenue Agent Hutnick concerning, primarily, a conversation with petitioner Wechsler in 1965, after the conspiracy had terminated (Pet. 27–28).

Hutnick testified to post-conspiracy interviews with five defendants (including petitioners Wechsler, Goldblatt, and George Faigen). The subject of these interviews was the reason for the $5,500 payment to Somers, the role played by defendant Gibson, and the availability of records dealing with the rezoning (see C.A. 240–254). Hutnick began his testimony with the Wechsler interview. When it became apparent that Hutnick would testify concerning a conversation had in 1965, defense counsel asked for a limiting instruction. The court stated (C.A. 240–241):

> Insofar as it is limited to 1965, as it is limited to Mr. Wechsler, if it refers to matters occurring during the period of the charge, then it can be considered by the jury in connection with all of the defendants in determining whether there was a conspiracy and whether they ever became a member thereof.

Defense counsel objected, whereupon the court gave a

supplemental instruction to the same effect (C.A. 241–242).

Although the instruction was erroneous, since post-conspiracy declarations are admissible only against the declarant, irrespective of whether they relate to the period of the conspiracy, *Delli Paoli v. United States*, 352 U.S. 232, the error was harmless in the context of this case.

Hutnick testified that Wechsler told him that the $5,500 check to Somers (C.A. 243–244)

> * * * was in payment to Mr. Somers. He said that Trailer Court Ventures or he—a group had entered into an agreement with Mr. Somers and Somers was to do a study on, I think, on trailer parks. * * * He mentioned that this agreement called for payment of something like $15,000 to Mr. Somers and that after Mr. Somers started the study, or whatever he was to do, there was some disagreement between the members of the partnership, Trailer Court Ventures, and they decided they weren't going to go through or have Mr. Somers do the complete study, or something like that, or I think he said they weren't satisfied with Mr. Somers' work, so they settled, he said, that they—this $5,500 check was in payment to Mr. Somers in settlement of that agreement or contract that they had with him.

This account, with minor variations, was the same as the testimony of defense witnesses and was in accord with petitioners' defense that the $5,500 check was in payment to Somers for legal services rendered to Trailer Court Ventures. Hutnick's testimony, more-

over, was virtually identical to testimony (submitted under accurate limiting instructions) given by Revenue Agent McElroy, who interviewed petitioner Wechsler in November 1965, approximately a month before Hutnick's interview (C.A. 154–157). And the court's final instructions to the jury correctly stated the law with regard to post-conspiracy declarations, albeit in general terms (C.A. 371–372). In these circumstances, the court of appeals, which did not discuss the issue,[11] was justified in treating the error as harmless.[12] *Lutwak* v. *United States*, 344 U.S. 604, 619–620.[13]

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[11] The court found petitioners' contention to be "without merit" on the basis of the identical arguments made here (Pet. App. A, 7).

[12] Petitioners' contentions with regard to Hutnick's testimony concerning the Goldblatt and Burrage interviews (Pet. 28) are without substance. The evidence regarding the Goldblatt interview was admitted without objection to the court's acquiescence in defense counsel's motion that the conversation be considered only against Goldblatt (C.A. 246). The Hutnick-Burrage interview contained nothing harmful to petitioners (C.A. 250–251).

[13] This Court's decision in *Bruton* v. *United States* (No. 705, this Term, decided May 20, 1968), overruling *Delli Paoli*, does not require a different result. There the Court held that the admission of "powerfully incriminating extrajudicial statements of a codefendant" specifically implicating Bruton in the crime presented a "risk that the jury will not, or cannot, follow instructions [which] is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" (Slip Op. at p. 13). To the extent that *Bruton* may be applied retroactively, the possible prejudice to codefendants resulting from the jury's consideration of the extrajudicial statements of an alleged coconspirator would seem to be minimal where, as in the present case, the hearsay statements were exculpatory as to the declarant, in no way implicated any other defendant in the crime, and in fact lent support to the theory of the defense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER TERM, 1967

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v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY FOR PETITIONERS

I

Petitioners were convicted of a conspiracy to violate 18 U.S.C. § 1952(a)(3), which makes it a federal crime to use an interstate facility "with intent to * * * promote, manage, establish, [or] carry on * * * any unlawful activity * * *." § 1952(b)(2) defines "unlawful activity" as "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." The court of appeals affirmed petitioners' conviction on the basis that, under this statute, the "state crime serves 'only as a background

identification of the unlawful activities' " (Pet. App. 3a), quoting with approval an opinion of the Sixth Circuit in *United States* v. *Wingo,* which the Government now advises (Br. in Op. 9, ftn. 7) has been withdrawn.[1]

In urging this Court to deny review of that holding, the Government misstates it. The court of appeals did not decide "that a conspiracy to violate Section 1952 *may be evidenced by* the use of an interstate facility during the period of the bribery scheme" (Br. in Op. 9, emphasis supplied); it held as a matter of "statutory construction" (Pet. App. 6a) that a conspiracy to violate § 1952(a)(3) may be established even if the use of interstate facilities was unaccompanied by an *intent* to violate state law, and that the substantive offense is not to be "equated with, and limited by, the state law" (Pet. App. 2a). The first question presented by the Petition in this case is whether this view of

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[1] In the court of appeals the Government relied heavily on the original *Wingo* opinion. When the court below affirmed petitioners' convictions, it accepted and relied upon the Government's construction of the Sixth Circuit's holding (Pet. App. 3a), unaware that that court had withdrawn its opinion two months before. Petitioners, who were likewise unaware of the Sixth Circuit's action, filed a petition for rehearing in which they urged, *inter alia,* that *Wingo* did not support the majority's conclusion (Petition for Rehearing 3, 4, 5). If the court below had known that the principal authority on which it relied had been removed, it might well have granted the petition for rehearing to consider the statutory issue and thereupon reversed the convictions. We submit that under these circumstances the Government, which was a party both to *Wingo* and this case, was obliged to advise the court that *Wingo* had been withdrawn. Although we urge this Court to resolve the statutory question by granting certiorari, thereby mooting the problem caused by the Government's silence, failing that, the proper administration of justice requires that the court of appeals be given the opportunity to consider the question in the light of the knowledge that *Wingo* is no longer a precedent.

the statute, which differs from that of the Fifth, Sixth, Seventh, Eighth and Ninth Circuits (Pet. 17), is correct. The Government not only recasts that question in terms which have no relation to it or to this case (Br. in Op. 2), but avoids coming to grips with our argument by misreading it and disclaiming disagreement with an argument we do not make.[2]

After convincing the court below to adopt its position "that the accomplishment of the final rezoning * * * is properly within the term 'bribery' as it is found in 18 U.S.C. § 1952" (Br. for Appellee 7), the Government seeks to avoid review through another device. This time it substitutes the words "bribery scheme" (Br. in Op. 6, 7, 9) for the words "conspiracy to secure an illegal zoning" (Pet. 12-13). Of course, we cite no case to support the position that a prosecution cannot be maintained under § 1952(a)(3) if the minimal conduct necessary to sustain a state bribery conviction "occurs prior to the use of interstate facilities in furtherance of the bribery scheme" (Br. in Op. 7)—that is not our position. Petitioners' argument is that since the object of the conspiracy charged here is a violation of the substantive offense proscribed by § 1952(a)(3) (see Pet. App. 1a, 8a-9a), and since "[c]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself," *Ingram* v. *United States,* 360 U.S. 672, 678, it was impossible for any alleged conspirator to have used an interstate facility after § 1952(a)(3) was enacted *with intent to promote*

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[2] We do not contend merely "that Section 1952 *incorporates* the elements of bribery under State law * * * " (Br. in Op. 7); we insist that it also "circumscribes" the federal offense in terms of state law (Pet. 15, 17, 18), and that it requires an *intent* to violate state law (Pet. 15, 17-18).

bribery under Virginia law, since, prior to the enactment of § 1952(a)(3), that bribe had already been accomplished.

The Government is driven to these artifices because its position in this case is contrary to its own prior representations to this Court (see Pet. 16, 20-21, text and ftn. 27) and because there is also pending its own request for review of a lower court decision which passes on the relationship between § 1952(a)(3) and state law—*United States* v. *Nardello,* No. 1277, this Term.

The Government endeavors mightily to get its cake in *Nardello* and to keep it in this case. But we submit that both logic and sound judicial administration require that these cases be decided together. The relationship between the two issues clearly appears from the opinion which the Government seeks review in *Nardello*:

> "[T]he House and Senate hearings consistently show what the words of the statute themselves attest: that the incorporation of state definitions for the crimes of extortion and bribery was enacted with the expectation that their content would differ substantively from state to state. The term 'extortion' in 18 U.S.C. § 1952 was thus intended to track closely the legal understanding under state law, and was not designed to be more generic in scope. * * * The Pennsylvania definition of extortion, therefore, is strictly controlling in the instant case."[3]

In other words, the *Nardello* court held that § 1952 requires the federal courts to look to state law (1) to

[3] *United States* v. *Burke,* 278 F. Supp. 711, 712 (E.D. Pa. 1968), appeal pending, *sub nom. United States* v. *Nardello,* No. 1277, this term.

determine the scope of the "unlawful activity" and (2) to characterize that unlawful activity as "extortion, bribery, or arson." In *Nardello,* the Government challenges the second ruling. In order to decide the question raised by the Government, the Court must consider the same materials—the language of §§ 1952(a)(3) and (b)(2), as well as their legislative history—which control the question in this case. Indeed, the issue posed by the Government attains significance only if the scope of the "unlawful activity" is governed by state law as we contend. As the Government itself said in its jurisdictional statement in *Nardello* and reiterates here (Br. in Op. 7), the statute withholds "federal penalties for conduct which is not an offense at all under state law." If "that does not mean that the reach of the federal statute is to be circumscribed by the events to which each State determines its local prosecution should attach" (*id.*) what does it mean? Unless the state determines that "its local prosecution should attach" thereto, "conduct is not an offense at all under state law." The short of it is that in this case the trial court allowed the jury to impose "federal penalties for conduct which is not an offense at all under state law," an unlawful zoning (Pet. 12-13); and the court of appeals expressly held that the federal offense is *not* to be "equated with, and limited by, the state law of bribery" (Pet. App. 2a).

That holding would merit review by the Court even if *Nardello* were not pending. While the Government urges that the statutory question "is less likely to recur" because it "was occasioned *primarily* by the fact that Section 1952 was enacted after the [alleged] bribery scheme had been initiated" (Br. in Op. 9, emphasis supplied), it is a curious notion that the reviewability of a statutory interpretation should be *dimin-*

ished by the circumstance that it gives an *ex post facto* effect to the statute. In any event, the erroneous construction had *four* additional adverse consequences on petitioners (Pet. 16, ftn. 23) including the trial court's refusal to charge the jury (as petitioners requested) that it could convict on the conspiracy charge only if it found that a defendant had, after September 13, 1961, an intent to establish or carry on bribery in violation of Virginia law (Pet. 12).[4] Moreover, once it is acknowledged that the statutory question does control the outcome of this case—a fact which the court of appeals made crystal clear (Pet. App. 1a-2a, 6a) and which the Government apparently does not dispute—its importance does not depend on how it arose in this case, but on how widely it will affect *other* cases.

The problems of vagueness inherent in the court of appeals' construction (Pet. 20-21) are in no way alleviated by the Government's artful rephrasing in its Opposition. If § 1952 is not "a precise reflection of the various State bribery statutes" (Br. in Op. 7), how imprecise may the reflection be? If " the reach of the statute" is not circumscribed by the events to which each State determines its local prosecution should attach" (*id.*) by what events, if any, shall it be circumscribed? If a state "interest" in certain activities is sufficient to warrant prosecution under § 1952 (Br. in Op. 8), how is that interest to be determined, other than by the state law itself, which Congress adopted in its definition of "unlawful activity"?

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[4] If, as we insist, "unlawful activity" means "bribery * * * in violation of the laws of the State in which committed," this instruction was required under *Ingram* v. *United States*, 360 U.S. 672, 678.

And quite aside from the due process problems which are created by the Government's attempt to set § 1952 at large—problems which it previously represented to be nonexistent precisely because state law governs (see cases cited at Pet. 20-21, ftn. 27)—the balance between state and federal law which Congress preserved in § 1952 is destroyed. Cast off from the moorings of state law, and without the aid of a congressional definition, the courts would be required to create a new federal common law of "extortion, bribery, and arson", "aiding the enforcement of" (Br. in Op. 9), but not limited by, state law. The federal courts have historically eschewed such a role. *United States* v. *Gradwell*, 243 U.S. 476, 485.

As to all this, the Government says nothing; our assertion that the consequence of the decision below "is to inject uncertainty into all future prosecutions under § 1952" (Pet. 15) is unanswerable.

Although our position rests squarely on the language of § 1952(b)(2) (see particularly Pet. 18, *et seq.*), the Government's discussion makes no reference to that section. Instead, when it speaks of "the language which Congress used in Section 1952" it refers primarily to subsections (a)(1) and (a)(2), which have nothing to do with this case (Br. in Op. 7-8, ftn. 6).[5]

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[5] *United States* v. *Kubacki*, 237 F. Supp. 638, 642-643 (E.D. Pa. 1965), upon which the Government relies (Br. in Op. 8, 9), in no way supports its position. *Kubacki* involved distribution of the proceeds of a bribe under § 1952(a)(1) where, although the bribe had been completed under state law prior to the enactment of § 1952, the distribution of the proceeds occurred thereafter. The distribution of the proceeds—the precise offense for which the Kubacki defendants had been indicted (see 237 F. Supp. at 639-640, n. 2)—occurred subsequent to § 1952's enactment. *McIntosh* v. *United States*, 385 F. 2d 274 (8 Cir. 1967), also cited by the

And when it quotes subsection (a)(3), under which petitioners were prosecuted, it commits an unpardonable sin of advocacy—it deletes (Br. in Op. 8) the critical language whose meaning is in issue—"unlawful activity"—and substitutes therefor "[bribery]", omitting the essential qualification "in violation of the laws of the State in which committed." We earnestly submit that an argument which takes this form should not foreclose plenary review of a statutory construction which the United States can defend only by excising the controlling statutory language.

II

The Government argues that petitioners' claim that they were convicted of a crime not charged in the indictment "is essentially a rephrasing of the argument" on the proper construction of § 1952(a)(3). But even if the court below properly departed from the plain language of § 1952, the Constitution entitled petitioners to be tried on the basis of the indictment *as written*. Thus, *Stirone* v. *United States*, 361 U.S. 212, is controlling even under the Government's view that that case applies only where the trial judge admits "proof of an element of the offense which was not alleged in the indictment" (Br. in Op. 11, ftn. 8). For, although the indictment cannot fairly be read as charging a con-

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Government (Br. in Op. 9), actually supports our position. That case follows *Marshall* v. *United States*, 355 F. 2d 999 (9 Cir. 1966), *cert. denied*, 385 U.S. 815 (Pet. 17), in holding that "although the 'unlawful activity' of extortion must be one *defined and proscribed by state law*, it need not be an accomplished fact to sustain a conviction under Section 1952 * * *." 358 F. 2d at 277 (emphasis supplied).

spiracy engaging the use of interstate facilities to promote an illegal zoning (Pet. 22-23), the trial court admitted over objection prejudicial evidence of acts and statements occurring long after the termination of the alleged bribe conspiracy on the erroneous theory that it was in furtherance of an illegal zoning (*e.g.*, G. Ex. 25, CA 469; G. Ex. 26, CA 472; G. Ex. 19, CA 462-463). Moreover, the Government reads *Stirone* too narrowly. That case holds that where an indictment is drawn in narrow terms the evidence to support the conviction must be in the same narrow terms "even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing" in broader terms. 361 U.S. 212 at 218. Accordingly, even if the statute would have permitted petitioners' trial and conviction on the theory that the "unlawful activity" was an illegal zoning accomplished by means of bribery as the trial judge charged (CA 359-360, 369, 373), the indictment did not. See Pet. 22-23.

The Government says also that the switch from the Court's pre-trial construction of the indictment to its post-trial instructions to the jury is merely a "difference in the form of expression" and not "a ground for reversal" (Br. in Op. 10). Of course, every instruction to a jury and every ruling by a court is a "form of expression"; such differences have been held to be "ground for reversal" in many cases, including those cited at Pet. 22-26. Here, likewise, "form" *does* matter. The difference between the court's original construction of the indictment and that on which it allowed the case to go to the jury goes to the heart of

the case.[6] While the Government is able to say with the benefit of hindsight that "the indictment clearly foreshadowed" what issue would be "presented to the jury" (Br. in Op. 11), petitioners were entitled in preparing for trial to rely on the construction of the indictment which they received from the trial court. While the "essential issue presented to the jury" was that described by the Government (Br. in Op. 11), the case would never had gone to the jury at all if the trial court had adhered to its original construction (Pet. 5-6) whereunder "the essential issue" was whether the Government proved—as it represented it would—that Leigh's personal check to Cotten dated September 9, 1961 was actually delivered on or after September 13, 1961.

III

In opposing review of the ruling which required petitioners other than Leigh to go to trial jointly with him, thereby depriving them of his testimony (Pet. 7, 26-27), the Government cites *Bruton* v. *United States*, No. 705, this Term, for the proposition that "Joint

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[6] This precise objection was made in the clearest possible terms: "I just want to say that, in view of the state of the record, as I read it and I understand it, that the defendant that I represent, if he goes to this Jury, is going to the Jury on a crime which was never charged in this indictment * * *, and if it was charged in the indictment, it is a crime which is not a crime under any Federal law that I read." (CA 347-348). The assertion that the relevance of the switch "was argued by petitioners (see *e.g.*, CA 282-287) *only with respect to the issue of law whether the government's proof established a crime embraced within the federal statute*" (Br. in Op. 11, emphasis supplied), is thus belied by the record.

trials of co-conspirators are clearly desirable" (Br. in Op. 12). The essential point, however, is that *Bruton* decided that the preservation of the constitutional rights of defendants is even more "desirable". Just as *Bruton* was entitled to a separate trial in order to protect his rights under the "Confrontation" clause, petitioners were entitled to a separate trial to guarantee their rights under the "Compulsory Attendance" clause. *Washington* v. *Texas*, 388 U.S. 14, 19. *Bruton*, decided after the present petition was filed, thus presents an additional and compelling ground for granting review of the severance issue.

Even before *Bruton* was decided, one court of appeals had held that severance must be granted in circumstances which do not differ in principle from those in this case. For, while the Government urges that the trial court was entitled to consider the "likelihood that Leigh might elect to exercise his privilege against self-incrimination when called to the stand" (Br. in Op. 12), *United States* v. *Echeles*, 352 F. 2d 892 (7 Cir. 1965), squarely foreclosed that speculation.[7]

Moreover, the Government misstates both the basis of the trial court's ruling and the record on which it was made. Contrary to the Government's contention (Br. in Op. 12, ftn. 9), the expected substance of Leigh's testimony (the date of delivery and *purpose* of Leigh's check to Cotten) was disclosed by Mr. Sha-

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[7] That court said: "With regard to the question of whether or not Arrington would claim the privilege if he were called as a witness during a trial of Echeles alone—a trial held subsequent to his own—we can only say that such question was not properly the Government's to interpose. Speculation about what Arrington might do at a later Echeles trial undoubtedly would be a matter of some concern to Echeles, but he should not be foreclosed of the possibility that Arrington would testify in his behalf merely because that eventuality was not a certainty." 352 F. 2d at 898.

piro, counsel for petitioner Goldblatt (CA 96-97). The trial court refused (CA 97-98) to permit Mr. Shapiro to elicit the same representations from Mr. Batchelor (Leigh's counsel) in open court. It is also untrue that the trial "court denied the motion [for severance] without prejudice to reconsideration if Leigh himself were to state that he was prepared to give exculpatory testimony on behalf of the other defendants" (Br. in Op. 12). The condition imposed was far more severe: Counsel was required to obtain "an exculpatory statement [from Leigh] helping everybody else in this case and * * * *taking the onus himself*" (CA 96, emphasis supplied). Only a confession by Leigh would have sufficed even if all defendants, including Leigh, were innocent. The trial court was thus prepared to honor "the right to present a defense", *Washington* v. *Texas,* 388 U.S. 14, 19, only on condition that Leigh surrender both his right to defend the accusation against himself and his privilege against self-incrimination. This was not "the exercise of * * * discretion" (Br. in Op. 12), but the application of an unconstitutional standard. "In short, for each of the defendants to see the face of Justice they must be tried separately". *DeLuna* v. *United States,* 308 F. 2d 140, 155 (5 Cir. 1962). The question is simply whether, by indicting defendants jointly, the prosecution may impose on one or more of them the loss of constitutional rights. Both because of its constitutional dimensions, and its widespread importance to the administration of criminal justice in the federal courts, that question should be answered now.

IV

While conceding that the trial court's failure to limit petitioner Wechsler's post-conspiracy declarations was error, the Government contends it "was harmless in

the context of this case" (Br. in Op. 15) because these "hearsay statements were exculpatory" (Br. in Op. 16, ftn. 13). But "[i]f a statement made were truly exculpatory, it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used * * * to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication." *Miranda* v. *Arizona,* 384 U.S. 436, 477. Since this is precisely what the prosecution sought to and did, in fact, accomplish through Agent Hutnick's testimony,[8] such statements were "incriminating in any meaningful sense of the word." *Miranda, supra.* Despite the Government's contrary assertion (Br. in Op. 16), the error was not cured by the charge. See *Collenger* v. *United States,* 50 F. 2d 345, 349-350 (7 Cir. 1931),

[8] The defense was that petitioners Wechsler, Goldblatt and the Faigens had hired Somers, a lawyer, to assist them in connection with their zoning application for $15,000 plus $500 for a brochure, and that that fee was eventually settled for $5,500, contingent upon favorable action by the Supervisors (Pet. 11). Yet, according to Evangelist, a Government agent, petitioner Wechsler initially said that Somers was Peachey's lawyer not petitioners' (CA 235). Later, Wechsler told McElroy, another Government agent, that (1) petitioners had obtained Somers' services to do some *survey* work (CA 155) and (2) he had no idea why Somers had given Leigh a check for $5,500 (CA 157). When Agent Hutnick took the stand he said Wechsler told him that (3) petitioners had hired Somers to do a *study* on trailer parks (CA 243) and (4) Somers "must have had" a separate deal with Leigh on the original $15,000 (CA 245). This testimony showed not only that Wechsler had given Evangelist and Hutnick two different stories, but also that Wechsler had given Hutnick a different story from that he had given McElroy. When, in addition, Hutnick testified that petitioner Goldblatt told him that he Goldblatt, did not think Somers had anything to do with the zoning (CA 247-248), at least two of the four developer defendants had given inconsistent explanations of Somers' zoning role to three different Government agents.

where the charge was almost identical to the one in this case (compare 50 F. 2d at 349 with CA 371-372); *Abbate* v. *United States*, 247 F. 2d 410, 413 (5 Cir. 1957); *Yokely* v. *United States*, 237 F. 2d 455, 458 (9 Cir. 1956).

Moreover, although the Government now asserts that the court below was "justified in treating the error as harmless" (Br. in Op. 16), that court did no such thing nor did the Government there concede that it was error, albeit "harmless". In fact, contrary to what it says now (Br. in Op. 16, ftn. 11), the Government successfully convinced that court that "the factor that distinguishes this case from those cited by appellants"[9] was that "*all the statements of these defendants, as testified to by the Agent, were totally exculpatory*" (Br. for Appellee 53, emphasis in original). This is the only basis upon which the court below could have held this issue to be "without merit" (Pet. App. 7a) since it reversed the same Judge for the same instruction in regard to *inculpatory* statements only months before. *United States* v. *Chase*, 372 F. 2d 453, 460 (4 Cir. 1967). Surely, if the court below had thought the instructions, although erroneous, were "harmless", it would have said so, just as it did in regard to the DeMik issue (Pet. App. 7a).

Since this Court cannot know whether the court below even regarded the trial court's instructions to be error, it cannot know whether that court scrutinized the record to determine whether such error was harmless or whether, if it did so, it applied the proper standard. Accordingly, the Government's belated concession that the trial court erred (Br. in Op. 15) entitles peti-

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[9] *E.g.*, *Lutwak* v. *United States*, 344 U.S. 604; *Delli Paoli* v. *United States*, 352 U.S. 232.

tioners to scrutiny of the record either by this Court on certiorari or by the court of appeals after summary remand.

V

In arguing that the exclusion of DeMik's testimony "did not affect petitioners' substantial rights" (Br. in Op. 13-14), the Government forgets what it had said earlier—that the "essential issue presented to the jury * * * was whether the $5,500 check to Somers was in payment for legal services or was intended to be disbursed to various county supervisors in exchange for a favorable vote" (Br. in Op. 11). The district court's ruling foreclosed petitioners from placing before the jury evidence which would have shown the innocence of that payment more forcefully than any which the trial court did admit, for it would have been established that petitioners had been advised by their attorney to make that payment. Moreover, even if the court below were right and that evidence "could have added [little] to the jury's knowledge" (Pet. App. 7a), petitioners were entitled to place in the strongest light their explanation of the transaction for which the Government sought to convict them. Contrary to the court of appeals' view, an error in the exclusion of such evidence cannot be cured by spelling out a party's "contentions * * * in the charge to the jury" (Pet. App. 7a). Indeed, *in the absence of evidence to support them,* such contentions are most likely to induce the jury to discredit the defense, to accept the Government's version of the transaction, and to convict. On any standard, therefore, the application of 28 U.S. § 2111 below was untenable. But the more important issue—and the one to which the Petition for Certiorari was addressed (Pet. 30-31)—is whether error can be treated as harm-

less unless the court can "declare a belief that it was harmless beyond a reasonable doubt". *Chapman* v. *California,* 386 U.S. 18, 24. The Government does not contend that this issue is unworthy of review. It does not express a position on how this issue is to be resolved. It does not mention it at all. Inevitably, that question will repeatedly arise in the federal courts until it is settled, and since petitioners' trial was also marred by the *admitted* error on the post-conspiracy declarations, this case is an especially appropriate vehicle for its resolution.[10]

CONCLUSION

By reason of the foregoing, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[10] Since the Government did not confess error on the *Lutwak* point in the court below, the cumulative effect of the two errors on the fairness of petitioners' trial has never been considered by any court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1377

NATHAN WECHSLER, GEORGE FAIGEN, SEYMOUR FAIGEN, SIGMUND GOLDBLATT, ROBERT C. COTTEN, JR., and A. CLAIBORNE LEIGH, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners respectfully petition this Court for rehearing of the denial of the petition for a writ of certiorari entered June 17, 1968. As grounds for rehearing, petitioners state as follows:

I.

Probable Jurisdiction Noted In United States v. Nardello, No. 1277, Oct. Term 1967[1]

On the same day this Court denied certiorari in this case, probable jurisdiction was noted in *United States* v. *Nardello*, No. 1277, Oct. Term 1967. Decision by this Court in *Nardello* may authoritatively affect the

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[1] Renumbered as No. 51, Oct. Term 1968.

outcome of this case. So much is clear from a comparison of the district court's holding in *Nardello* with the Fourth Circuit's holding in this case:

Nardello	*Wechsler*
"'The term 'extortion' in 18 U.S.C. § 1952 was thus intended to track closely the legal understanding under state law, and was not designed to be more generic in scope. * * * The Pennsylvania definition of extortion, therefore, is strictly controlling in the instant case.'"[2]	"[T]he offense of using a facility in interstate commerce to promote, manage, establish, or carry on bribery and thereafter performing an act to promote, manage, establish, or carry on bribery is [not] to be equated with, and limited by, the state law of bribery."[3]

In deciding *Nardello,* this Court is faced with the following basic alternatives:

(1) It can affirm the district court's ruling that "unlawful activity" as used in 18 U.S.C. §§ 1952 (a)(3) and (b)(2) means those crimes characterized as "extortion, bribery or arson" in each state's criminal code;

(2) It can reverse the district court and hold that "unlawful activity" is defined by the substantive provisions of each state's law of "extortion, bribery or arson" irrespective of how such crimes are characterized in its code;

(3) It can reverse the district court and hold that "unlawful activity" covers any act, whether or not illegal under state law, so long as it is

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[2] *United States* v. *Burke,* 278 F. Supp. 711, 712 (E.D. Pa. 1968), probable jurisdiction noted, *sub nom. United States* v. *Nardello,* No. 1277, Oct. Term 1967.

[3] *United States* v. *Wechsler, et al.,* 392 F.2d 344, 346 (C.A. 4, 1968).

> sufficiently related to "extortion, bribery or arson" as to bring the actors within the "manifest purpose of the [federal] statute * * * ". *Wechsler, supra,* 392 F.2d at 347.

If this Court should adopt alternatives (1) or (2), petitioners automatically would be entitled to reversal of the court of appeals' decision here. Only if alternative (3) be adopted—a result eschewed in *Viereck* v. *United States,* 318 U.S. 236, 245—would *Nardello* leave undisturbed the holding of the court of appeals in this case.

The points of identity between this case and *Nardello* are therefore compelling grounds for reconsideration of the denial of certiorari here. In fact, since, in order to decide *Nardello,* the Court must consider both the language of 18 U.S.C. §§ 1952(a)(3) and (b)(2) and their legislative history—the same materials which control the outcome of this case—the Court should permit this case to be briefed and argued together with *Nardello* if only to explore, determine, and authoritatively settle the meaning of "unlawful activity" as that term is used in the statute. It is particularly appropriate that this be done here because (1) the statutory question will more often arise in a *Wechsler* (substantive provision of the state statute), rather than in a *Nardello* (title of the state statute), context and (2) the court of appeals' holding in this case is in direct conflict with the district court's holding in *Nardello.* The Court should therefore permit this case to be briefed and argued together with *Nardello.*

Failing that, the Court should defer further consideration until after *Nardello* has been decided on the merits. If, in deciding *Nardello,* this Court should construe §§ 1952(a)(3) and (b)(2) in accordance with alternatives (1) or (2) above, this petition

should be granted and petitioners' convictions reversed. This was the course followed in *Forgett* v. *United States,* 390 U.S. 203, where the Court deferred consideration of a petition for rehearing from a denial of certiorari pending decision of a related question in *Marchetti* v. *United States,* 390 U.S. 39, in which certiorari had been granted following the denial of certiorari in *Forgett.* Petitioners should not be sent to prison while the question whether they have been convicted of a nonexistent crime awaits decision in *Nardello.*

II.

Pre-trial Proceedings In United States v. Reynolds, et al., Crim. No. 1208-67 (D. D.C.)

As an alternative to plenary review, this case should be remanded for further proceedings in the district court in accordance with the procedure outlined in *Hoffa* v. *United States,* 387 U.S. 231, 233. See *Kolod* v. *United States,* 390 U.S. 136, petition for rehearing pending. It now conclusively appears that petitioners' Fourth and Fifth Amendment rights were violated as a result of the introduction of incriminating evidence obtained from them by IRS agents who were "fronting" for the Justice Department's Organized Crime Section.[4]

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[4] Petitioners timely raised this question by motion to suppress in the district court, and argued it in the court of appeals. The issue was not included in the petition for writ of certiorari because some of petitioners' counsel were of the view that the factual record was insufficiently clear to warrant review. The same question is raised in the pending petitions for writs of certiorari in *Parrish and Parzow* v. *United States,* Nos. 1379 and 1382, Oct. Term 1967 (renumbered Nos. 70 and 72, Oct. Term 1968), another case arising out of alleged corruption in Fairfax County, Virginia. That case was tried by the same judge who presided in this case

On the very morning the Court denied certiorari in this case, counsel obtained a copy of the transcript of a pre-trial proceeding held June 4-5, 1968, in *United States* v. *Reynolds, et al.,* Crim. No. 1208-67 (D. D.C.), another case arising out of alleged corruption in Fairfax County, Virginia. In *Reynolds,* a number of the Internal Revenue agents, who in this,[5] *Parrish-Parzow,* and other cases, secured incriminating evidence under the guise of conducting routine audits of petitioners' tax returns (*Reynolds,* Tr. 19-20, 44, 61, 128, 131, 207, 211, 214, 227, June 4 and 5, 1968), admitted that, at the time they were ostensibly auditing these returns, they were, in fact "investigating bribery in Fairfax County of Public Officials" (Tr. 43-44, 68, 94, 114, 254, 264) as part of the "Metro Project", a joint IRS-Justice Department task force (Tr. 90, 114), operated under the "direction" (Tr. 137) of Edward T. Joyce, an attorney in the Justice Department's Organized Crime Section, who "supervised the bringing of indictments and prosecution of all violations of Section 1952 throughout the country both by the FBI and by the Internal Revenue Service" (Tr. 151).

Although a taxpayer may not assert a privilege against self-incrimination with respect to his tax rec-

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and was decided by the court of appeals the same day it decided this one. In fact, much of the *Parrish-Parzow* argument depends upon the record in this case (*Parrish-Parzow,* Br. in Op. 10, ftn. 10). In opposing certiorari in *Parrish-Parzow* the Government does not argue the issue is insubstantial, but asserts that "the record * * * contains no support for the claim that the Government obtained this evidence by misrepresenting to petitioners that the investigation it was conducting * * * was a purely civil inquiry, without criminal aspects or overtones." (Br. in Op. 10).

[5] See, *e.g.,* G.Ex's 15 and 16 (CA 446, 447); testimony of IRS Agent McElroy (CA 151-152); testimony of IRS Agent Evangelist (CA 235); testimony of IRS Agent Hutnick (CA 239-250).

ords, is compelled to turn over such records to IRS agents under pain of violating 26 U.S.C. § 7203, and is not entitled to a *Miranda*[6] warning even though he later be indicted for tax fraud (*e.g., Kohatsu* v. *United States,* 351 F.2d 898, 900-902 (9 Cir. 1965), *cert. denied,* 384 U.S. 1011), the rule is otherwise where the IRS agents' overriding interest is not "the collection of revenue, [but] the prosecution of [alleged bribers]." *Grosso* v. *United States,* 390 U.S. 62, 68-69; *Marchetti* v. *United States,* 390 U.S. 39, 73-74 (Brennan, J., concurring). It follows that, if a state conviction was set aside in *Bumper* v. *North Carolina,* No. 1016, Oct. Term 1967, decided June 3, 1968, because an officer gained entry by falsely representing that he had a search warrant, petitioners' convictions must be set aside also. Here IRS agents gained access to petitioners' records by falsely representing they were conducting routine tax audits.[7]

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[6] *Miranda* v. *Arizona,* 384 U.S. 436.

[7] In *Reynolds,* IRS Agent Evangelist, who conducted the "routine audit" of Trailer Court Ventures in this case (CA 108-109, 234-239), testified as follows:

> "Q. But, sir, what impresses me is that in this particular case a special agent [McElroy] and a supervisor of a project [Cole] deliberately engaged in seeking out criminal activities gave you your instructions at the outset to conduct a 'civil tax audit'.
>
> "A. That is correct." (Tr. 211)

III.

The Petition for Certiorari in Parzow v. United States, No. 72, Oct. Term 1968

A petition for certiorari in *Parzow* v. *United States*, No. 72, Oct. Term 1968, is presently pending. That case raises the question whether a defendant is entitled to have the trial judge ask prospective jurors on the *voir dire* whether any juror might be prejudiced against a defendant who belongs to the Jewish faith (*Parzow*, Pet. 2). As we made clear in the petition for certiorari in this case, the very same question is involved here. We there pointed out: "If certiorari is granted in that case [*Parzow*], we will move to amend our petition to include that issue as one of the 'Questions Presented' here" (Pet. 8, ftn. 8). Since petitioners Wechsler, Goldblatt, and the Faigens are each Jewish and since the Court has twice held that a criminal defendant must be granted the opportunity to inquire on the *voir dire* whether any juror harbors a prejudice against the particular race or religion of which the defendant is a member (*United States* v. *Aldridge*, 283 U.S. 308, 312-313; *Swain* v. *Alabama*, 380 U.S. 202, 220-221), consideration of this case should be deferred until after disposition of the petition for certiorari in *Parzow*.

CONCLUSION

By reason of the foregoing, the petition for rehearing should be granted.

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CERTIFICATE OF COUNSEL

Counsel hereby certifies that the above petition for rehearing filed pursuant to Rule 58(2) of the Rules of this Court is presented in good faith and not for delay, and that said petition is restricted to grounds confined to intervening circumstances of substantial and controlling effect, and to other substantial grounds available to petitioners although not previously presented.

David I. Shapiro

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1377

NATHAN WECHSLER, GEORGE FAIGEN, SEYMOUR FAIGEN, SIGMUND GOLDBLATT, ROBERT C. COTTEN, JR., and A. CLAIBORNE LEIGH, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO SUPPLEMENT AND SUPPLEMENTAL MEMORANDUM ON PETITION FOR REHEARING

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v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR REHEARING

Petitioners respectfully move this Court for leave to supplement the Petition for Rehearing filed by them in this case. The purpose of the motion is to call to this Court's attention, and to discuss the implications for this case of the Brief for the United States in *United States* v. *Nardello,* No. 51, Oct. Term 1968.* In that brief the Government adopts a construction of 18 U.S.C. § 1952(a)(3) and (b)(2) which is in accord with the position of petitioner, but contrary to the theory of the prosecution and the lower courts. We show in the supplemental memorandum that the Gov-

* Unless this motion is granted, the Court will probably not have examined the government's brief in *Nardello* when it considers the present Petition, which in the normal course would be during the first week of October, prior to the scheduled commencement of oral arguments.

ernment's *Nardello* brief (1) is inconsistent with its position in prosecuting petitioners; (2) makes it almost certain this Court will ultimately adopt a construction of 18 U.S.C. §§ 1952(a)(3) and (b)(2) under which petitioners' guilt cannot be supported; and (3) reinforces our position in the Petition for Rehearing that this case should either be heard together with *Nardello*, or at a minimum, held in abeyance pending decision of that case.

For these reasons we urge that the present motion be granted, and that the supplemental memorandum be received and considered.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-[illegible]

NATHAN WILLIAMS, *Chief Fiscal Officer, Maryland Department of Health and Mental Hygiene*, STANLEY GOLDSTEIN, *Secretary, Department of Health and Mental Hygiene*, and A. SHERIDAN LEDDY, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL MEMORANDUM OF PETITION FOR REHEARING

The [illegible] question presented by the Petition for Certiorari, the answer to which [illegible] the Court of Appeals overlooked (Pet. 5a-7a) [illegible] at the heart of this case, is:

"Is the term 'assistance' as used in 42 U.S.C. § 1396d(a)(13) [illegible] by the same term identified in § 1396d(b) [illegible] Part C[illegible] of Title [illegible]?"

arrange a [illegible] brief (3) is inconsistent with its position in [illegible] petitioners (2) assure it at least certain that Court will [illegible] adopt a construction of 28 U.S.C. 55 [illegible](a)(2) and (3)(B) under which petitioners' suit cannot be supported; and (4) reinforces the position in the Petition for Rehearing that this case should either be heard together with Nashville, or at a minimum, held in abeyance pending decision of that case.

For these reasons petitioners urge that the present motion be granted, and that the supplemented memorandum be received and considered.

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OCTOBER TERM, 1967

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v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL MEMORANDUM ON PETITION FOR REHEARING

The first question presented by the Petition for Certiorari, the answer to which—as the Court of Appeals recognized (Pet. 1a-2a)—is at the heart of this case, is:

> "Is the term 'unlawful activity' as used in 18 U.S.C. § 1952(a)(3) circumscribed by the state laws identified in § 1952(b)(2), thereby requiring proof of a use of interstate facilities with intent to violate those state laws?" (Pet. p. 2)

In Petitioners' view this question must be answered in the affirmative. The United States has now filed a brief wherein it agrees with Petitioners' construction of 18 U.S.C. §§ 1952(a)(3) and (b)(2)—a construction contrary to the theory upon which the case was sent to the jury and upon which petitioners' convictions were affirmed.

In its brief on the merits in *United States* v. *Nardello,* No. 51 Oct. Term 1968, (hereafter "Br. for U.S."), the Government says:

> "To be faithful to the congressional purpose, we submit, what is determinative must be whether the conduct is within the generic connotation of 'extortion', as Congress used the term, *and* whether the activity is prohibited by state law." (Br. for U.S., p. 13)[1]

The use of the conjunctive *and* (emphasized by the Government) makes it entirely clear that the Government regards the violation of state law as essential to the federal offense. The Government explains why the offense created by federal law is indeed "equated with and limited by state law," contrary to the view of the Court below (Pet. App. pp. 1a-2a):

> "Because the avowed purpose was to plug the breach in effective state enforcement, Congress related the activities banned to violations of the laws of the state in which they take place." (Br. for U.S., p. 14)

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[1] See also Br. for U.S., p. 18: "But where the conduct is extortionate in the federal, generic usage—like 'gambling' in the examples above—*and* where the state does make it unlawful, Section 1952 is by its terms and its purpose applicable—just as it would be applicable to the interstate bookmaker just discussed." (Emphasis in original)

Accordingly,

> "The objective of assisting state law enforcement is reflected in the decision to withhold federal penalties for conduct which is not an offense at all under state law." (Br. for U.S., p. 16)

The same point had been conceded by the Government's Brief in Opposition to certiorari in this case, quoting from its own Jurisdictional Statement in *Nardello.* But the Government then proceeded to confuse the issue by the following circumlocution:

> "But that does not mean that the reach of the federal statute is to be circumscribed by the events to which each State determines its local prosecution should attach." (Br. in Opp., p. 7)

We pointed out in our reply brief that this latter proposition is simply irreconcilable with the Government's concession, since the existence of a violation of federal law depends precisely on "the events to which each State determines its prosecution should attach." This is confirmed by the Government's brief in *Nardello,* which, by the use of two different examples, shows that there could be no violation of § 1952(a)(3) if the state has determined that its prosecution should not attach to those "events". At pp. 15-16 of its *Nardello* brief the Government explains that the legality under § 1952(a)(3) of interstate travel to Nevada to operate a dice game depends on whether Nevada forbids that conduct. And, at p. 17 of that brief, it says:

> "We would agree, for example, that if by state statute, whether labelled blackmail or extortion, a crime is committed only when money or property is extracted by threat of force, then travel to

> that state in order to make threats to accuse a person of an infamous crime would not be an offense under 18 U.S.C. 1952."

This means, borrowing the Government's formulation in its Brief in Opposition herein, that "the reach of the federal statute" *is* "circumscribed by the events [*e.g.* extraction of money by threat of force] to which each State determines its local prosecution should attach."

In short, the "proper inquiry, we submit, is whether the intended extortionate [or briberous] acts of the defendant are prohibited by state law." Br. for U.S., p. 8. And since there is no such crime as an "unlawful-zoning" under Virginia law, petitioners could not be found to have used interstate facilities with intent to promote an "unlawful activity" under §§ 1952(a)(3) and (b)(2). Accordingly, petitioners were convicted of a nonexistent federal offense.

It would be entirely inconsistent with the Government's deliberately chosen position in *Nardello* to subject petitioners to "federal penalties" when their conduct was "not an offense at all under state law" (Br. for U.S., p. 16).

We recognize that the Government's construction of 18 U.S.C. § 1952(a)(3) is not binding on this Court. This Court would have power to hold that the correct interpretation is alternative (3) set forth in our Petition for Rehearing—that "unlawful activity" covers any act, whether or not illegal under state law, so

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[2] As Judge Winter said in dissent below, "petitioners were convicted of 'a federal crime not brought into existence by § 1952 itself,' the use of interstate facilities with intent to promote an illegal zoning." 392 F. 2d at 351-352.

long as is sufficiently related to "extortion, bribery or arson" as to bring the actors within the "manifest purpose of the [federal] statute."[3] This was the view taken by the Court of Appeals in affirming petitioners' conviction. But it seems to us highly significant that in preparing its brief in *Nardello,* the Government eschewed that alternative, although it would likewise require reversal of the lower court judgment in that case, and would maintain consistency with the theory on which the *Wechsler* petitioners were prosecuted and convicted.

It is fair to regard the choice, made at the highest litigating level in the Justice Department, with full awareness of the pendency of the present case, as a carefully deliberated interpretation of this statute. Moreover, even if there had been doubt, considerations of litigation strategy, as well as the natural tendency—whose propriety we do not impugn—of enforcement officials to urge a broad, rather than a narrow construction, would have caused the Government to urge the construction by the Court of Appeals herein, rather than alternative (2), or at least to argue for reversal in *Nardello* on the basis of both alternatives. The inference is compelling that since the Government decided that it could not fairly urge alternative (3), there is little likelihood that this Court will ultimately determine it to be the correct construction of § 1952 (a)(3). The Government's action thus reinforces our argument in the Petition for Rehearing (pp. 1-2) that when this Court decides *Nardello,* it " may authoritatively affect the outcome of this case."

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[3] Pet. pp. 2-3, quoting from *Wechsler* v. *United States,* 392 F. 2d 344 at 347.

Petitions for Rehearing are understandably not favored. But this Court has granted such petitions, *even though filed out of time*—to assure "uniformity in the application of the principles" announced by this Court. See *United States* v. *Ohio Power Co.*, 353 U.S. 98 and cases cited *id.* at 99.[4] Of particular interest are the cases where the Court *sua sponte* granted rehearing out of time from denials of petition for certiorari in prosecutions on a net worth theory, so that they could be reexamined under the rules established in *Holland* v. *United States*, 348 U.S. 121, even though it was uncertain whether the outcome of those cases would be affected thereby.[5] Here, of course, the Petition for Rehearing is *timely*, and adoption of the construction in *Nardello* of §§ 1952(a)(3) and (b)(2) contended for by the present petitioners—and now by the Government—would *necessarily* entitle them to a new trial, or, indeed, as Judge Winter believed, to acquittal.

It would be shocking to send petitioners to prison when the Government has disavowed the statutory basis of their prosecution, particularly since this Court can be expected to decide in *Nardello* that the conduct

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[4] In dissenting from the grant of rehearing in *Ohio Power* Mr. Justice Harlan said: "I need hardly say that the granting of untimely relief in criminal cases presents considerations not found in civil cases." 353 U.S. 99, at 106. These considerations are, of course, present here and can be effectuated without disregard for the Court's own rules.

[5] *Goldbaum* v. *United States*, 347 U.S. 1007; *Banks* v. *United States*, 347 U.S. 1007; *McFee* v. *United States*, 347 U.S. 1007. Those petitions for rehearing were granted before *Holland* was argued. Ultimately, certiorari was granted and the causes remanded for reconsideration in light of *Holland* and its companion cases. 348 U.S. at 905.

with which petitioners were charged is not an offense at all under federal law.

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